# The constitutionality of religious observances in South African public schools

by
Cecile van Schalkwyk

*Thesis presented in fulfilment of the requirements for the degree of Master of Laws at Stellenbosch University*

Supervisor: Professor H Botha
Faculty of Law
Department of Public law
December 2016

# DECLARATION

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Cecile van Schalkwyk
December 2016

## SUMMARY

The right to freedom of religion is one of the oldest of the internationally recognised freedoms and is entrenched in section 15(1) of the Constitution of the Republic of South Africa, 1996 ("Constitution"). It is the hallmark of an open and democratic society and provides everyone with the right to practise their religion in the public sphere and to manifest their beliefs by way of religious dress, teaching, or the conducting of religious observances. Section 15(2) of the Constitution makes specific provision for religious observances to be conducted at state and state-aided institutions provided that (a) those observances follow rules made by the appropriate public authorities, (b) they are conducted on an equitable basis, and (c) attendance at them is free and voluntary. The Constitution has created a peculiar tension with the inclusion of section 15(2). On the one hand, it allows for the practice of religion in the public sphere, while on the other hand guaranteeing the right to religious freedom and freedom from religious coercion.

In South Africa, religious observances are often conducted in the public school system. Public schools make provision for religious observances like prayer, worship, or the reading and interpretation of religious texts, while some schools even identify themselves as having a particular religious character or religious ethos. The South African Schools Act 84 of 1997 ("Schools Act") delegates the power to determine rules on religious observances in public schools to the governing body of the school. In a country with a diverse citizenry it is often difficult for governing bodies to formulate rules that afford all learners an equitable right to religious observances, while being free from any religious coercion. What, from one perspective, would constitute a school community's legitimate practice of their constitutionally guaranteed right to religion, might, from another, amount to a limitation of an individual learner's right to be free to choose and practise his own religion or abstain from religious observances at all.

The object of this study is to determine how the requirements for religious observances in state and state-aided institutions, as stipulated in section 15(2) of the Constitution and reiterated in section 7 of the Schools Act, must be interpreted within the context of public schools, to strike a constitutionally appropriate balance between the powers of school governing bodies and the right of learners to be free from religious coercion.

# OPSOMMING

Die reg op vryheid van godsdiens is een van die oudste van die internasionaal erkende menseregte en is verskans in artikel 15(1) van die Grondwet van die Republiek van Suid-Afrika, 1996 ("Grondwet"). Dit is 'n kernbepaling in 'n oop en demokratiese samelewing en waarborg aan elkeen die reg om hul godsdiens in die publieke sfeer te beoefen deur middel van godsdienstige kleredrag, onderrig of godsdiensbeoefening. Artikel 15(2) van die Grondwet maak spesifiek voorsiening vir godsdiensbeoefening by staats- of staatsondersteunde instellings, mits (a) daardie beoefening reëls nakom wat deur die tersaaklike openbare gesag gemaak is, (b) dit op 'n billike grondslag geskied, en (c) die bywoning daarvan vry en vrywillig is. Die invoeging van artikel 15(2) in die Grondwet skep 'n besondere spanning. Aan die een kant maak dit voorsiening vir godsdiensbeoefening in die publieke sfeer, en aan die ander kant waarborg dit die reg op vryheid van godsdiens en om nie aan godsdienstige dwang onderwerp te word nie.

In Suid-Afrika vind godsdiensbeoefening dikwels in openbare skole plaas. Hierdie skole maak voorsiening vir godsdienstige gebruike soos gebed, aanbidding, of die bestudering van religieuse tekste. Sommige skole neem selfs 'n bepaalde godsdienstige karakter of etos aan. Die South African Schools Act 84 of 1997 ("Schools Act") delegeer die mag om reëls oor godsdiensbeoefening in die skool te maak aan die skoolbeheerliggaam. Dit is moeilik vir beheerliggame om in 'n diverse samelewing reëls te formuleer wat aan alle leerders 'n billike reg op godsdiensbeoefening gee, en terselfdertyd niemand aan godsdienstige dwang onderwerp nie. Vorme van godsdiensbeoefening wat, vanuit 'n bepaalde perspektief neerkom op die uitoefening van 'n skoolgemeenskap se grondwetlike reg op godsdiensvryheid, mag vanuit 'n ander perspektief gesien word as 'n skending van 'n individuele leerder se reg om sy eie godsdiens te beoefen of geensins aan godsdiensbeoefening deel te neem nie.

Die doel van hierdie studie is om te bepaal hoe die vereistes vir godsdiensbeoefening by staats- en staatsondersteunde instellings, soos bepaal deur artikel 15(2) van die Grondwet en artikel 7 van die Schools Act, uitgelê moet word om 'n gepaste grondwetlike balans te skep tussen die magte van skoolbeheerliggame en die regte van leerders om vry te wees van godsdienstige dwang.

## ACKNOWLEDGEMENTS

Dankie aan my studieleier, Professor Henk Botha, vir ‘n menswees wat die diepte van menswees verstaan…en vir tyd.

Dankie aan my gesin vir hul onbaatsugtige ondersteuning – daar is immers baie gesug en niemand het daarby gebaat nie.

# TABLE OF CONTENT

# TABLE OF ABBREVIATIONS

**ACRWC** – AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

**ANC** – AFRICAN NATIONAL CONGRESS

**CNE** – CHRISTIAN NATIONAL EDUCATION

**CODESA** – CONFERENCE FOR A DEMOCRATIC SOUTH AFRICA

**CRC** – CONVENSTION ON THE RIGHTS OF THE CHILD

**FAK** – FEDERASIE VAN AFRIKAANSE KULTUURVERENIGINGE

**FEDSAS** – FEDERATION OF GOVERNING BODIES FOR SOUTH AFRICAN SCHOOLS

**HOD** – HEAD OF DEPARTMENT

**ICCPR** - INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

**ICNE** – INSTITUTE OF CHRISTIAN NATIONAL EDUCATION

**MEC** – MEMBER OF THE EXECUTIVE COUNCIL

**NECC** – NATIONAL EDUCATION CRISIS COMMITTEE

**NEPI** – NATIONAL EDUCATION POLICY INVESTIGATION

**NP** – NATIONAL PARTY

# CHAPTER 1

# INTRODUCTION

## 1 Background to the research problem: religious observances in South Africa

The right to freedom of religion is considered to be one of the oldest of the internationally recognised human freedoms.[1] Most democratic states provide a constitutional guarantee of religious freedom, while others promulgate legislation or set policies to give effect to this right.[2] Religious freedom is also afforded recognition in many international legal documents and conventions.[3] In South Africa, freedom of religion is entrenched as a fundamental right in the Constitution of the Republic of South Africa, 1996 ("Constitution").[4] The Constitutional Court of South Africa has described the practice of religion as one of the hallmarks of an open, democratic and free society[5] that awakens "concepts of self-worth and human dignity which form the cornerstone of human rights."[6]

According to the 2001 census figures,[7] over 80% of South Africans regard themselves as Christians, spread over 34 groupings and numerous denominations.[8] Islam, Hinduism, Judaism and African traditional beliefs comprise almost 5% of believers, with around 15% of the population adhering either to traditional indigenous religions or no religion at all.[9] It is thus clear that South Africa is a fairly religious society with a majority of the population holding at least some form of religious conviction. It is, however, also a religiously diverse society, with even the majority religion encompassing a large array of different denominations. Part of the right to religious freedom is the right to participate in, and conduct

---

[1] P Farlam "Freedom of religion, belief and opinion" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (2009) 41-12.

[2] B Bekink "The intrinsic uneasy triangle between constitutionalism, secularism and the right to freedom of religion – a South African perspective" (2008) 3 *Tydskrif van die Suid-Afrikaanse Reg* 481 482.

[3] This includes the *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), *United Nations Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 ("CRC"), *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 22 April 1954) 999 UNTS 137 ("ICCPR"), *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religious Belief* (adopted 18 December 1979, entered into force 3 September 1981) A/RES/34/180, and the *African Charter on Human and People's Rights* (adopted 27 June 1981, entered into force 21 October 1986 CAB/LEG//67/3.

[4] Section 15 of the Constitution.

[5] *Prince v President of the Law Society, Cape of Good Hope* 2002 (2) SA 794 (CC) (*"Prince"*) para 24.

[6] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) ("*Christian Education"*) para 36.

[7] In the 2011 national census no questions were posed about the religious convictions of the South African citizenry. The 2001 figures are thus the most recent information on the country's religious demographic.

[8] D Bilchitz & S de Freitas "Introduction: The right to freedom of religion in South Africa and related challenges" (2012) 28 *South African Journal of Human Rights* 141 141.

[9] LM du Plessis "Affirmation and celebration of the 'religious Other' in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?" (2008) 8 *African Journal of Human Rights Law* 376 380.

religious observances, either individually or as part of a religious community. Observances of a religious nature may be conducted in a private setting, in a religious institution as part of a religious activity, or in a public setting.

Section 15(2) of the Constitution makes specific provision for religious observances to be conducted at state and state-aided institutions. It protects the right of religious adherents to manifest their religion in the public sphere, subject to certain requirements. Observances must (a) follow rules made the appropriate public authorities,[10] (b) be conducted on an equitable basis,[11] and (c) attendance at them must be free and voluntary.[12] It is generally accepted that the drafters of the Constitution included this section partly in an effort to ensure that religious observances may be conducted within the public school system.[13] In the pre-constitutional era, religion had been an integral part of formal education and this section aimed to preserve some of this practice, albeit under rules that are more democratically and constitutionally reflective.

Section 7 of the South African Schools Act 84 of 1997 ("Schools Act") delegates the power to issue rules on religious observances to the governing body of the school. The Constitution has, however, created a peculiar tension with the inclusion of section 15(2), read with section 7 of the Schools Act. On the one hand, it allows for the practice of religion in the public sphere (including the school environment), while on the other hand guaranteeing the right to religious freedom and freedom from religious coercion. What, from one perspective, would constitute a school community's legitimate practice of their constitutionally guaranteed right to religion, might, from another, amount to a limitation of an individual learner's right to be free to choose and practise his own religion or abstain from religious observances at all. In a country with such a diverse citizenry it is often difficult for schools to navigate this tension and ensure that all learners are afforded an equitable right to religious observances, while being free from any religious coercion.

In South Africa, many governing bodies simply refrain from adhering to section 15(2) and actively promote themselves as schools with a particular religious character or ethos.[14]

---

[10] Section 15(2)(a).
[11] Section 15(2)(b).
[12] Section 15(2)(c).
[13] LM du Plessis "Religion, law and the state in South Africa" (1997) 4 *European Journal for State and Church Research* 221 233; N Smith "Freedom of religion under the final Constitution" (1997) 114 *South African Law Journal* 220; I Currie & J de Waal *The Bill of Rights Handbook* 6th ed (2013) 330; GE Devenish *The South African Constitution* (2005) 72.
[14] E Thelwell "Does God belong in schools?" (2014-09-05) *News24* <www.news24.com/South Africa/News/Does-God-belong-in-schools-20140905> (accessed 02-02-2015); M Thamm "Religion in schools: Watershed case to ensure teaching and not preaching" (2014-09-03) *Daily Maverick* (accessed 15-03-2015).

Religious observances are consequently often conducted in accordance with the majority religion, while religious minorities are coerced into participation. This is partly because section 15(2) is one of the few provisions in the Bill of Rights that have not been the subject of a legal dispute. As a result, the courts have not had an opportunity to interpret and define the nature and extent of the right to conduct religious observances.[15] The legislature and the Department of Education have, through the Schools Act and the National Policy on Religion and Education, 2003 respectively, attempted to assist public schools in drafting rules on religious observances. However, the Schools Act only reiterates section 15(2), while the Policy is unclear and has not been interrogated for compliance with the Constitution.

In order to determine the constitutionality of religious observances in South African public schools, it is imperative that the requirements in section 15(2) of the Constitution, together with section 7 of the Schools Act, be interpreted and defined. Establishing what is meant by "state and state-aided institutions", "rules", "equitable basis", and "free and voluntary" is needed in order to determine whether the religious observances conducted by a school adhere to the Constitution and the Schools Act. Section 15(2) must, however, be interpreted within the framework of the Constitution as a whole, taking cognisance of supporting and related rights in the Bill of Rights.[16] The Schools Act and the National Policy on Religion and Education attempt to concretise section 15(2), and must therefore also be analysed. Any interpretation afforded to the right to conduct religious observances must ultimately protect and further the constitutional and democratic values of freedom, equality and human dignity.

## 2 Research question, research aims and methodology

The research question addressed in this study centres on how the requirements for religious observances in state and state-aided institutions, as stipulated in section 15(2) of the Constitution and reiterated in section 7 of the Schools Act, must be interpreted within the context of public schools, to strike a constitutionally appropriate balance between the powers of school governing bodies and the right of learners to be free from religious coercion. As a point of departure it is accepted that the Constitution allows for religious observances to be

[15] In August 2014, an application was filed in the Gauteng High Court by the non-governmental organisation, Organisasie vir Godsdienste-Onderrig en Demokrasie. The application is aimed at prohibiting six public schools from subjecting their learners to any form of religious observances or practices, advertising themselves as exclusively Christian or as schools with a Christian ethos and exposing the learners to direct or indirect religious coercion. At the time of submitting this thesis, the case had not been heard before court.

[16] These are: the right to religious freedom (section 15), equality (section 9), human dignity (section 10), freedom of expression (section 16), right to assemble, demonstrate, picket and petition (section 17), freedom of association (section 18), right to a religious community (section 31), the best interest of the child (section 29), and the general limitation clause (section 36).

conducted in public schools. The aim of this study is to establish how these observances must be constructed to be constitutionally permissible. This will be done by analysing and interpreting relevant constitutional provisions, legislation, case law, policy documents, and international and foreign law.

The study will argue that the right to conduct religious observances is not a stand-alone right, but functions within a broader constitutional, legislative and policy framework that influence the nature and the form that religious observances can take. It will also be argued that a symbiotic relationship exists between the requirements of "free and voluntary" and "equitable basis" in section 15(2), and that they work together in structuring religious observances in a constitutionally permissible way. It is submitted that a more lenient interpretation must be afforded to "free and voluntary", which will allow for a limited measure of indirect coercion. The undue coercive burden this might cause to learners, parents and teachers can however be mitigated by construing "equitable basis" strictly, requiring a high standard of equity for the religious observances performed in the school. Throughout the study suggestions will be made as to how rules around observances in public schools can be drafted to comply with the Constitution.

**3 Overview of chapters**

Chapter 2 will analyse the relationship between the state and religion in South Africa. The purpose of this chapter is to determine what model of state-religion interaction is envisioned by the Constitution, as it will create the theoretical framework within which the constitutionality of religious observances in public schools will be evaluated. This will entail an overview of different models of state-religion relations, after which the South African approach will be discussed. The history of the relationship between the state and religion in South Africa will be analysed, including the role that religion played in the education system. The chapter will then examine the impact of the Constitution on religion-state relations and describe the characteristics of the accommodation model envisioned by the Constitution.

Chapter 3 will provide an overview of the constitutional-, legislative- and policy framework that governs religious observances in South Africa. This includes the constitutional provisions regarding religious freedom, equality, human dignity, freedom of expression, the right to assemble, demonstrate, picket and petition, freedom of association, the right to a religious community, the best interest of the child, and the general limitation clause. The impact of the Schools Act will also be discussed, as well as the role of the National Policy on Religion and Education. Finally, the international law instruments that

relate to religious observances in public schools will be analysed in order to determine what role they can play in the structuring of religious observances in public schools.

Chapter 4 will provide an in-depth analysis and interpretation of section 15(2) of the Constitution. This will include a discussion on the definition of "state and state-aided institutions" as well as an interpretation of the meaning of "rules". The purpose is to determine the legal status of the rules issued by the governing body and whether they have to adhere to the rule of law. Finally, the meaning of "appropriate public authority" in the context of public schools will be discussed. This will entail an analysis of the powers of school governing bodies and the implications of developments in case law for the ability of a governing body to issue rules on religious observances.

Chapter 5 will address the meaning of "free and voluntary" as required by section 15(2). This includes a discussion of direct and indirect coercion as well as a legal comparative analysis of the American, Canadian and German approaches to religious coercion. The purpose of the comparative study is to determine what rights-based and policy arguments are relevant when interpreting the voluntariness requirement in section 15(2). An analysis will then be provided of the way in which "free and voluntary" must be interpreted within the South African public school setting.

Chapter 6 will focus on the requirement of "equitable basis" in section 15(2). This will include a general definition of "equity" as well as a discussion of the way in which religious equity has been achieved in German religious instruction. Using the German approach to religious instruction as an example of how equity can be achieved in a religiously diverse society, a model will be proposed for the interpretation of "equitable basis" in the Constitution. Practical suggestions will also be made as to how religious observances can be structured to adhere to this requirement.

## 4 Definition of "religious observances"

The definition of "religious observances" in section 15(2) has largely been clarified in case law and refers to a very particular set of conduct. Van Dijkhorst J in *Wittmann v Deutscher Schülverein, Pretoria*[17] defines "religious observances" as an "act of religious character, a rite." This includes "[t]he daily opening of a school by prayer, reading of the scripture (and possibly a sermon or religious message, and benediction)."[18] In particular, "religion" is viewed as the "human recognition of super human controlling power and especially of a

[17] 1998 JOL 3644 (T) ("*Wittmann*") 60.
[18] 60.

personal God or gods entitled to obedience and worship."[19] Although *Wittmann* was decided under section 14(2) of the Interim Constitution, the case clearly extends this rather narrow interpretation of religious observances to section 15(2) of the Final Constitution.[20] Religious education is deliberately excluded,[21] which means education of a confessional nature (such as studying the Bible) or of an informal general nature is not protected under section 15(2).[22]

The National Policy on Religion and Education[23] does not provide a definition of the term, but does give a few examples of religious observances that may be protected under the Policy. These include voluntary public occasions, which make use of school facilities for religious services on a day of worship or rest; voluntary occasions when the school community gather for religious observances; observances held in a voluntary gathering of pupils and/or teachers during a school break; and an observance which may be ongoing such as dress, diet and prayer times that must be respected and accommodated in a manner agreed upon by the school and the relevant faith authority.[24] All of these practices are, however, subject to the Constitution and the Schools Act, which means that they must still meet the requirements of section 15(2).

It is thus clear that section 15(2) was intended to protect only a narrow category of practices. Religious instruction and religious education, where children are proselytised towards a specific religion, will not fall under section 15(2) and will constitute a limitation of section 15(1) if practised in the public school system in South Africa. The ambit of this study is restricted to religious observances that are conducted at public schools, either with the assistance of the school or simply facilitated by the school. The study does not address issues like religious dress or diet. These are in themselves controversial topics and although they are regarded as forms of religious observance, this study will focus on observances such as school prayers, the reading of religious texts, the singing of religious songs, or any other observance that constitutes a collective public display of religious affiliation.

## 5 Religious observances: A qualifying provision or a right?

As has already been mentioned, section 15(2) of the Constitution is generally viewed as an attempt by the constitutional drafters to make provision for the practice of religious

[19] 59.
[20] 60.
[21] 60.
[22] Currie & De Waal *Bill of Rights Handbook* 331.
[23] See Chapter 3 for a further discussion of the National Policy on Religion and Education.
[24] The National Policy on Religion and Education section 59.

observances in South African public schools.[25] Smith[26] argues that the insertion of section 15(2) was a conscious decision by the drafters to distinguish South Africa from the broad trend of North American school prayer cases where religious observances have been prohibited as they are viewed as at least indirectly coercive. As a point of departure, religious observances in South African state and state-aided institutions are thus constitutionally permissible, as long as they comply with the requirements of the Schools Act and section 15(2) and do not infringe on any of the rights or freedoms in the Constitution. The constitutionality of particular devotional practices may consequently be challenged on the basis that they are not free and voluntary or are not conducted on an equitable basis.

Section 15(2) states that religious observances "may" be conducted at state and state-aided institutions. The word "may" suggests a mere possibility,[27] as opposed to an absolute obligation or necessity. On the face of it section 15(2) seems to provide institutions, as well as the individuals that form part thereof, an opportunity to choose to conduct religious observances or not. It invites the possibility of religious observances and authorises their presence in state and state-aided institutions, but does not make them obligatory for the institution or the individuals. A question, however, arises as to the nature of section 15(2). Is it merely a provision that qualifies section 15(1), or does it create a general right to conduct religious observances in state and state-aided institutions?

Reading section 15(2) as a mere qualifying provision would not necessarily establish a right on which religious adherents can rely to compel an institution to allow them to conduct religious observances. Section 15(1) confers a general right to freedom of religion that does not contain any specifications on the extent of the right. Section 15(2) can be read as qualifying section 15(1) by indicating that the right to religious freedom does not preclude religious observances at state and state-aided institutions.[28] On this reading, section 15(2) does not create a right on which individuals can rely, but rather establishes state and state-institutions as environments where religious observances may take place.

It would be possible for either the institution itself or the individuals who form part of the institution to initiate the practice of religious observances and for the institution to draft rules

[25] Du Plessis "Religion, law and the state in South Africa" *European Journal for State and Church Research* 233; Smith "Freedom of religion under the final Constitution" *South African Law Journal* 220; Currie & De Waal *The Bill of Rights Handbook* 330; Devenish *The South African Constitution* 72.
[26] "Freedom of religion under the final Constitution" *The South African Law Journal* 220.
[27] J Crozier, A Grandinson, C McKeown, E Summers, P Weber (eds) *Collins English Dictionary* (2005) 497.
[28] Section 15(2) would thus have a status similar to that of section 15(3), which provides that section 15 does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law.

on the place, time and manner in which observances are to be conducted. This reading is supported by the fact that section 15(2) does not contain an explicit reference to a "right" as is the case in section 15(1). It could therefore be argued that section 15(2) does not create a stand-alone right. This means that, if an institution makes a decision not to allow for a specific place and time to conduct religious observances, an individual will not be in a position to argue that the institution infringes on section 15(2). In terms of this reading section 15(2) simply empowers institutions to allow for observances, but does not create a right on the side of adherents to insist on observances in accordance with their faith.

The above interpretation is a rather narrow reading of section 15(2) and the right to religious freedom in general. It would effectively mean that state and state-aided institutions can decide not to allow religious observances in the institution, even if a substantial part of the community that is served by it is in favour of such observances. This is problematic as an effort to eliminate religious observances in the institution could infringe on section 15(1) and the right to religious freedom of the individuals who form part of the institution. It will be argued in this study that section 15(2), read with section 15(1), creates a right to religious observances and that individuals can rely on that right to compel the state or state-aided institution that they form part of to take steps to accommodate religious observances. This argument will be based on a textual and contextual interpretation of section 15(2) and its role in the Constitution.

First of all, it is important to consider the nature of the right to religious freedom in section 15(1). The right to religious freedom includes the right to declare religious beliefs openly and to manifest religious beliefs.[29] Van der Schyff[30] argues that section 15(1) includes the right to freedom of religious observance which protects acts motivated and associated with religion. On this reading, section 15(2) can be viewed as a restatement and a refinement of the right to conduct religious observances under section 15 of the Constitution. It expressly makes provision for religious observances, thereby affirming the already-established right under section 15(1). It further extends this right to state and state-aided institutions, and makes its exercise in these institutions subject to certain requirements.

The establishment of religious observances as a "right" has certain constitutional implications for state and state-aided institutions. Section 7(2) of the Constitution enjoins the state to "respect, protect, promote, and fulfil the rights in the Bill of Rights." The first part of

[29] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) ("*Lawrence*") para 92. The right to religious freedom will be discussed more fully in Chapter 3.

[30] G van der Schyff *The right to freedom of religion in South Africa* (2001) unpublished LLM thesis Johannesburg: Rand Afrikaanse Universiteit 132.

this section acts as a shield against any excesses in the exercise of power by the state by requiring the state to refrain from interfering with the rights guaranteed in the Constitution and to ward off any threats against such rights.[31] The second part of the section speaks to the protection, promotion and fulfilment of rights and is premised on the notion that constitutional guarantees of human rights require the state to take positive action to promote the constitutional ideals of individual and communal self-realisation and fulfilment.[32] There is a positive obligation on the state and its organs (of which state and state-aided institutions form part) to provide appropriate protection to everyone through laws and structures designed to afford such protection[33] and to act to protect and promote the rights in the Bill of Rights.

The right to religious observances is one of the rights that have to be respected, protected, promoted and fulfilled under section 7(2). This means that there is an obligation on state and state-aided institutions to take active steps to facilitate and accommodate the religious observances of the individuals who form part of the institutions. Consequently, section 15(2) creates both a right and an opportunity for the individual. It does not force individuals to participate in religious observances, but provides that they "may" use this public setting to practise their religion, should they feel so inclined. Once individuals decide to exercise their right to conduct religious observances, the institution must as far as possible accommodate their practices and allow an opportunity for participation.

State and state-aided institutions must therefore try to take steps to facilitate religious observances when the need arises. This must be done in a manner that complies with section 15(2) and under rules that are both voluntary and equitable. Should there be no need for religious observances in a particular state or state-aided institution, and the individuals prefer to refrain from practising their religion in public, there is no obligation on the institution to take steps to facilitate participation. In instances like this, care must however be taken to ensure that a religious-friendly environment is maintained. Should new individuals who wish to conduct religious observances, join the institution, they must be reasonably accommodated. The obligation on the institution is thus subject to the needs of the members of the institution and may arise at varying times.

It is, however, submitted that an institution may refrain from allowing religious observances if it would be unduly burdensome. This is especially true for institutions that

---

[31] Du Plessis "Affirmation and celebration of the 'religious other'" *African Human Rights Law Journal* 383.
[32] 383; *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ("*Glenister*") para 105.
[33] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC) ("*Carmichele*") para 44.

provide a necessary service that will be negatively impacted should its members participate in organised religious observances. For example, should the staff of a public hospital insist on being allowed an hour every morning to practise their religious observances, it will inevitably lead to an unacceptable disruption of the workplace. If the nature of the institution and the nature of the observances are not compatible, it would not be unreasonable for the institution to declare that religious observances will not be facilitated at its premises and must be reserved for the private sphere. A decision like that does not completely negate the right to religious freedom, but limits it for legitimate reasons.

In the context of the public school system, section 15(2) allows religious observances to be conducted at schools that fall within the definition of "state and state-aided institutions". There is no obligation on learners, parents and teachers to conduct religious observances – they are allowed a choice by section 15(2). Should the school community however decide to conduct religious observances, an obligation arises on the side of the school and the governing body to attempt to facilitate and accommodate participation in accordance with the requirements of section 15(2). Schools cannot force learners and teachers to conduct religious observances, even if it is in accordance with their particular religion or beliefs. The decision to facilitate religious observances must be the result of an expressed need within the school community.

If a majority of the school community is religious, it is likely that a need will arise for the school to facilitate religious observances. The particular religions and the nature of the facilitation may change over time as the religious demographic of the school changes, but the need to accommodate observances will most likely be consistent. Just as in other state and state-aided institutions, it might occur in exceptional circumstances that the practice of religious observances become so divisive and so disruptive that a school may elect to entirely refrain from facilitating any religious observances. Should a school for example have a very religiously diverse learner-body and the practice of religious observances leads to emotional or physical intimidation between members of the school community, a school may consider putting a stop to the facilitation of religious observances. Although this will limit religious freedom, in particular the right to conduct religious observances, it would be a reasonable limitation in the circumstances. Before making a decision like this, a school must, however, try to take reasonable steps to solve the animosity that exists in the school community and foster religious tolerance.

A second consideration that adds weight to the argument that section 15 creates a right to religious observances is the wording of section 15(2). The institutions referred to in section

15(2) provide the public spaces where religious observances may be conducted. It clearly states that observances may take place "at" state and state-aided institutions. They form the institutional settings within which people are allowed to exercise their rights under section 15(2). The section does not state that religious observances may be conducted "by" state and state-aided institutions. There is an important distinction between these two formulations. If religious observances were to be conducted "by" state and state-aided institutions, there is the danger that the state may blur the line between accommodating religions and religious endorsement. Observances that are purely driven by the institutions, that are extensions of the state, as well as organs of state, have the potential to discriminate against some religions, while promoting others.

The section rather requires that state and state-aided institutions be environments for religious participation. This means that they must facilitate and accommodate religious observances in accordance with the needs of the people who form part of the institution. By using the word "at" the drafters seem to suggest that religious observances are not dependent on the discretion or the will of the institution, but rather the will of the people who form part of the institution and use it as a setting. The right thus falls to the individual, group, or community to decide to conduct religious observances, at which point the institution must attempt to facilitate the observances "at" the institution. An institution would arguably not be in a position to simply deny someone the opportunity to conduct religious observances without consulting with the individual or group and attempting to facilitate the needs of the adherents. To do so would be an infringement of the right to religious freedom in section 15(1) and the right to conduct religious observances in section 15(2), read with section 15(1).

A third important consideration is the role of minority rights. The Constitution, and in particular the Bill of Rights, intended to refine majoritarian democracy by making provision for the rights and freedoms of minorities.[34] Religious freedom has a fundamental role to play in protecting and promoting the religious rights of minorities. This includes the religious observances that are associated with their religion. It is important that religious observances be entrenched as a constitutional right on which religious minorities can rely to protect their religious freedom against that of the majority. This ensures that learners who adhere to a minority religion in a school setting can enforce their right to religious observances in an effective way by insisting on exemption from participation and the accommodation of their specific religious needs.

[34] Smith "Freedom of religion under the final Constitution" *SALJ* 221.

Lastly, the right to conduct religious observances must be understood against the larger South African and international framework. As will be illustrated in this study, religious differences have always been a source of tension in South African society, leading to ignorance of the religious "Other" that has fostered intolerance and created a divide between members of different religions. The right to conduct religious observances at state and state-aided institutions has the potential to bridge this divide by placing religious differences at the centre of human interaction. It requires the majority to respect the religious observances of minority adherents as it provides both the majority and the minority with similar rights. The majority can therefore not rely on their numbers to oppress and negate the religious freedom of minority believers, but are forced to respect their rights and interact with the religious "Other". The aim is to move beyond the point of mere tolerance of religious differences to an understanding, recognition, and acceptance of the religious idiosyncrasies of the "Other."[35] Recognising religious observances as a right that has to be respected fosters an environment in which religious diversity can thrive.

[35] Du Plessis "Affirmation and celebration of the 'religious Other'" *African Human Rights Journal* 379.

# CHAPTER 2

# STATE-RELIGION RELATIONS IN SOUTH AFRICA

## 1 Introduction

The relationship between religion and state has historically been one of complex controversy. In many countries of the world legal systems and state structures were informed and shaped by the dominant religion. Churches were often seen as centres of political and social control, with religious leaders actively engaging in the governance of states,[1] while political leaders were equally involved in the workings of the church. This alliance between the church and state took different forms[2] depending on the religion and the political circumstances, but it often proved to be an alliance with a wholly unholy[3] character. Over time, this somewhat incestuous relationship has made way for a more separatist model of state-religion interaction and very few absolute theocracies still exist.[4]

Today, the separation between religion and the state is regarded as a significant part of liberal democracy,[5] but practically, there are various forms of separation. This ranges from an absolute separation between the state and religion to models of separation that allow for considerable interaction between the two entities. In order to analyse the constitutionality of religious observances in South African public schools, it is important to determine the model of state-religion interaction envisioned by the Constitution of the Republic of South Africa, 1996. Public schools are state-aided public institutions and as such, must reflect the constitutional vision of state-religion interaction.

In South Africa the adoption of the Constitution fundamentally altered the way in which the state engaged with religion and religious institutions,[6] departing from the apartheid-model of Christian favouritism. South Africa has thus had the unique opportunity of re-inventing the relationship between the state and religion to create a model that adheres to the constitutional vision of human dignity, equality and freedom. The dominance of one religion was rejected,[7]

---

[1] P Cumper "Religious Liberty in the United Kingdom" in JD van der Vyver & J Witte *Religious Human Rights in Global Perspective* (1996) 205 217.
[2] D Bilchitz & A Williams "Religion and the public sphere: towards a model that positively recognises diversity" 28 *South African Journal of Human Rights* (2012) 146 146.
[3] Currie & De Waal *Bill of Rights Handbook* 336.
[4] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 146.
[5] 146.
[6] Farlam "Freedom of religion, belief and opinion" in Woolman et al *CLOSA* 41-2.
[7] JL van der Walt "Religion and education: is there yet another solution?" (2010) 75 *Koers* 78 81.

with the state rather opting for what has since been called the accommodation model, or the separation with interaction approach.[8]

In this chapter, a brief overview of the various models of state-religion interaction will be provided, where after the South African approach will be discussed. This will entail a historical overview of the relationship between the state and religion prior to the Constitution and an analysis and discussion of the accommodation model introduced by the Constitution. The purpose of this chapter is to determine the structure and content of this model and to provide a measure of clarity as to the way the relationship between the state and religion must function in post-apartheid South Africa. This will establish the theoretical framework for the subsequent discussion of the constitutionality of religious observances in public schools and act as a guideline for the interpretation of section 15(2) of the Constitution.

## 2 Models of state-religion interaction

The formal model of interaction that develops between the state and religion in a given country is usually determined by three factors, namely the constitution, legislation and the judicial interpretation of legislation.[9] This relationship is however also influenced by various other societal determinants like the stability of political regimes, the history of the state-religion relationship in the country, the degree of religious pluralism, the nature of the dominant religion(s) and their commitment to religious tolerance and freedom, and the historical interaction between religious groups in the country.[10] Models of state-religion interaction are traditionally viewed on a continuum,[11] with absolute control of the state by religion (theocracy) on the one end of the spectrum and a complete separation between the state and religion on the other end. Numerous models can be located in between these two extremes. Bilchitz and Williams[12] emphasise that state-religion models are not necessarily mutually exclusive - they overlap significantly and must therefore not be categorised too rigidly.

---

[8] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 156; J Smith "South Africa's developing model of state-religion relations" *Occasional Paper 18* (2005) 4.

[9] 2.

[10] WC Durham "Perspectives on Religious Liberty: A Comparative Framework" in JD van der Vyver & J Witte *Religious Human Rights in Global Perspective* (1996) 1 2

[11] Farlam "Freedom of religion, belief and opinion" in Woolman et al *CLOSA* 41-26; Smith "South Africa's Developing model of state-religion relations" *Occasional Paper* 2; JD van der Vyver "Introduction" in JD van der Vyver & J Witte *Religious Human Rights in Global Perspective* (1996) xi xviii.

[12] "Religion and the public sphere" *SAJHR* 148.

The complexity of categorising these models is evident from the variety of classifications and labels used by academics to describe state-religion relationships. Paul Mojzes[13] distinguishes between ecclesiastical absolutism, where one religion is afforded preferential treatment; religious toleration, where the state tolerates all religions while showing preference for a particular religion; secular absolutism, where the state is viewed as secular and all religions are rejected; and pluralistic liberty, where the state is neutral and indifferent to religion. International law authors like Dinah Shelton and Alexander Kiss[14] opt for a more nuanced classification. They identify five models of interaction, namely state control over religion; state neutrality towards religion; theocratic political perceptions, where a dominant religion controls the state sphere; state hostility towards religion; and the division of authority between the state and church with religious institutions being afforded autonomy over certain activities.

Writing from a South African perspective, Bilchitz, Williams[15] and Farlam[16] distinguish between theocracies on the one end of the spectrum and states with an overtly hostile approach to religion at the other end. Situated between these extremes are states with an established or endorsed church; states that follow a co-operative model of interaction, where no religion is regarded as dominant, but the state co-operates closely with churches in a variety of ways;[17] the accommodation model, where the state accommodates the specific requirements connected to citizens' religions without affording preferential treatment to a specific religion;[18] and the separationist model. In the latter instance, there is a wall of separation between the state and religion with minimal involvement of the state in religious activities, although this model manifests differently depending on the particular country.[19] In some states, the distinction between religion and the state is enforced with such vigour that the state can be perceived as hostile towards religion,[20] while others are more tolerant of the inevitable overlap with religious practices.

In what can be described as probably the most elaborate classification[21] of state-religion models, Cole Durham[22] identifies two additional models of interaction. They are states with

---

[13] Cited in Van der Vyver "Introduction" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* xix.
[14] xix.
[15] "Religion and the public sphere" *SAJHR* 148.
[16] "Freedom of religion, belief and opinion" in Woolman et al *CLOSA* 41-26.
[17] 41-26.
[18] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 156.
[19] Farlam "Freedom of religion, belief and opinion" in Woolman et al *CLOSA* 41-26.
[20] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 153.
[21] Van der Vyver "Introduction" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* xix.

an inadvertent insensitivity towards religion, and states that persecute religious followers – mostly those of minority religions. In the former instance, the aim of the state is not necessarily to infringe on the rights of religious communities, but the state remains ignorant of the negative impact legislation, regulations and policies have on certain religious groupings. This then results in the suppression of religious freedom.

In countries where religious groups are persecuted, there is a deliberate attempt by the state to eliminate all religious practices or those practices that do not conform to the dominant religion. Persecution can take the form of bureaucratic roadblocks that cumulatively have the effect of impairing religious liberty or, in more severe cases, the prosecution and imprisonment of those with divergent religious beliefs.[23] In the most extreme instances, this could even result in a form of "religious cleansing", bordering on genocide.[24] Although Durham identifies this as a separate model of state-religion interaction, religious prosecution is often an element of absolute theocracies, where the state attempts to suppress minority groupings that could possibly pose a threat to the state-religion.

From the discussion above it is evident that the names given to the various categories often reflect a distinction without a difference, illustrating the difficulty in creating models with distinct characteristics. Ultimately, these models and the way in which they operate can only be identified in broad terms. Their practical manifestation will differ depending on the state in question and the forces and factors unique to that state. In order to determine the most appropriate model under the South African Constitution, it is helpful to give a brief overview of the various models. By evaluating the positive and negative aspects associated with each, it will be possible to identify the characteristics that will best inform the model envisioned by the Constitution. As far as the names of the models are concerned, I will use the most commonly referred terms, and where uncertainty arises, attempt to group and clarify the names given by the various authors.

### 2 1 Theocracy

The theocratic model of state-religion interaction entails the merging of the state and a majority religion, resulting in the law of the state being identical to, or strongly resembling the law of that particular religion.[25] As a result of the close link between the state and

---

[22] WC Durham "Perspectives on Religious Liberty" in JD van der Vyver & J Witte (1996) *Religious Human Rights in Global Perspective* 22.
[23] 23.
[24] 23.
[25] Bilchitz & Williams "Religion and the Public Sphere" *SAJHR* 148.

religion, these states have a religious character, for example identifying them as Christian or Islamic states.[26] There are very few theocracies left in the world today and the examples most cited in this regard is the Vatican City (a Christian theocracy), and the so-called Islamic states[27] that consider *Sharia* as the basis of their legal codes.[28] According to the Universal Islamic Declaration of Human Rights, Islam does not recognise a division between the state and the church[29] and Islamic law is also regarded as the law of the state. The constitutions of most Islamic states profess to the overriding sovereignty of Allah,[30] or proclaim Islam to be the official state religion.[31] In some states like Afghanistan, Algeria, Mauritania and Pakistan, the constitution also requires the head of state and certain high ranking office bearers to be of the Muslim faith, effectively preventing adherents of minority religions from garnering any real political power.

In countries with a religiously homogenous citizenry, the theocratic model has the advantage of allowing people to be governed in accordance with their religious beliefs and affording them the opportunity to experience the full ambit of their religious convictions. It is a manifestation of their right to self-determination as people are allowed to choose to be governed by systems and institutions vastly different from the traditional Western forms of governance. Unfortunately, hardly any country in the world can classify itself as completely homogenous with no religious diversity[32] and the theocratic model has the inevitable consequence of infringing on the religious freedom of adherents to minority religions, and even those of the followers of the state religion.

In theocracies a very specific conception of the "good"[33] is imparted on people, regardless of their own convictions. This negatively impacts on their right to live their lives in accordance with their religion of choice and the preference of one religion indirectly coerces citizens to adopt the religion favoured by the state.[34] The preferential treatment afforded to one religion also impacts on the rights of other religious traditions to be treated equally before the law. Even in theocracies that are tolerant of religious diversity, the state will never

---

[26] 148.
[27] Afghanistan, Islamic Republic of Pakistan, Islamic Republic of Iran, Sudan, Yemen, Somalia, Saudi Arabia and Mauritania.
[28] Smith "South Africa's developing model of religion-state relations" *Occasional Paper* 2.
[29] Preamble of the *Universal Islamic Declaration of Human Rights* (1981).
[30] Van der Vyver "Introduction" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* xxxi; Some of the most notable examples are the Constitution of the Islamic State of Pakistan, the Constitution of Yemen and section 12 of the Constitution of the Islamic Republic of Iran.
[31] xxxi; Some examples in this regard are Afghanistan, Algeria, Mauritania, Pakistan, Saudi Arabia and Morocco.
[32] P Coertzen "Freedom of religion and religious education in a pluralistic society" (2002) 43 *Koers* 185 185.
[33] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 148.
[34] D Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997) 33.

be able to grant all religions equal rights and opportunities.[35] Inevitably, theocracies alienate people from the state,[36] undermining its legitimacy as a state for all its citizens.[37] A lack of respect for the rights of minorities fosters a culture of political instability[38] where people feel too alienated from the state to obey or respect its laws. This alienation also manifests on ground level. In countries where citizens are indoctrinated in accordance with a particular religion, discrimination, violence and animosity towards minority religions can easily be instigated. By treating the minority religions as the "Other", states create a culture in which anyone outside of the state religion is ostracised and vilified as religious degenerates. If left unaddressed, violence and persecution of minority religions can occur, resulting in a form of religious cleansing bordering on religious genocide.

The Iranian Islamic Revolution of 1979 illustrates this phenomenon. After the revolution, Baha'is, a liberal religion that emerged as an offshoot of Iranian Islam in the nineteenth century, was excluded as a minority religion from the Iranian Constitution and was denied any legal recognition.[39] Followers of Baha'is were persecuted, incarcerated, tortured and executed in post-revolutionist Iran.[40] Perceptions of the inferiority and degenerateness of minority religions can thus have a devastating impact on the members of that religion. Not only does it expose them to the possibility of violence and persecution, but it also excludes them from the opportunities and the rights afforded to the majority.

Furthermore, the fusion of the state and church effectively concentrates a vast amount of power in the hands of a central body – combining the authority of the state and religion to create a vehicle susceptible to abuse by government or church officials.[41] From the outset, it is quite clear that the theocratic model of state-religion interaction cannot reflect the vision of the South African Constitution. Under the Constitution everyone is afforded the right of religious freedom[42] and equality before the law and freedom from unfair discrimination on the basis of religion.[43] This means that all religions must be treated on an equitable basis, and it would be impermissible for the state to adopt the laws of any particular religion. A situation like that will effectively infringe on the right of every South African to live a free and

---

[35] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 149.
[36] 149.
[37] D Meyerson "Why Religion Belongs in the Public Sphere, Not the Public Square" in P Cane, C Evans & Z Robinson (eds) *Law and Religion in Theoretical and Historical Context* (2008) 44-53.
[38] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 150.
[39] AE Mayer "Law and Religion in the Muslim Middle East" (1987) 35 *The American Journal of Comparative Law* 127 182.
[40] 182.
[41] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 150.
[42] Section 15 of the Constitution.
[43] Section 9 of the Constitution.

dignified life in accordance with their religious convictions. The theocratic model will inevitably negate the Constitutional vision of a country that views human dignity, freedom and equality as the cornerstone of democracy.[44]

2 2 States with established and endorsed religions

In states with an established religion or church, the interaction between the state and religion is difficult to determine in abstract terms, as this relationship manifests differently depending on the country. At the most extreme end of this model, a particular religion has a virtual monopoly in religious affairs,[45] although the fusion of the state and religion is not as prevalent as in theocracies. The dominance of one religion is however reminiscent of the theocratic model and, although to a lesser degree, exhibits the same constitutional difficulties discussed in relation to theocracy. The next position is held by states that have an established religion, but tolerate a set of divergent religions and beliefs.[46] Sudan is a good example in this regard. Although it is an Islamic state, section 16 of the Sudanese Constitution protects Christians and members of "heavenly religions" from Islam.[47]

At the least extreme end of the spectrum, are countries with an established church, while simultaneously guaranteeing equal treatment, rights and protection to all other religions.[48] The interaction between the Church of England and the state in Great Britain illustrates this relationship, with the state tolerating all religions and affording its citizens religious freedom, regardless of the close ties it has with the Church.[49] General characteristics of the establishment model are that it provides for separate organisational structures and independent decision-making processes.[50] This means that at an institutional level, the state and the church are not as intertwined as in the theocratic model. No state authority is exercised by the church and for the most part, religious freedom of non-followers is respected.[51] The relationship between the state and a particular church is however evident in a

[44] Section 7(1) of the Constitution.
[45] Farlam "Freedom of religion, belief and opinion" in Woolman *CLOSA* 41-26.
[46] Durham "Perspectives on Religious Liberty" in Van der Vyver & Witte *Religious Human Rights in Global Perspectives* 20.
[47] Van der Vyver "Introduction" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* xxxiv.
[48] Durham "Perspectives on Religious Liberty" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 20.
[49] Smith "South Africa's Developing Model of Religion-State Relations" *Occasional Paper* 2.
[50] W Brugger "Structural Norms and Constitutional Rights in Church-State Relations" in W Brugger & M Karayanni (eds) *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (2007) 40.
[51] 40.

number of ways. This can include public holidays being scheduled on the holy days of the endorsed religion or affording recognition to that religion at public ceremonies.[52]

Related to this model of state-religion interaction, is that of states with an endorsed church. In these states, although one particular church is not officially affirmed as the church of the state, it is afforded special acknowledgement and treatment.[53] This is usually the result of that Church having a special place in the country's traditions,[54] history or culture.[55] This model is quite prevalent in countries where the Roman Catholic Church has historically played a dominant role.[56] Importantly, religious freedom is usually constitutionally protected and discrimination on religious grounds is prohibited in these states.[57] Sometimes the endorsed church model is however abused to maintain the veneer of religious liberty, while preserving the prerogatives of an established church.[58]

In states that adopt the models of an established or an endorsed church, the threat to religious liberty is not as prevalent as in theocracies, but religious freedom is by no means guaranteed. Here public power is not necessarily used to enforce a particular conception of the good, but such a conception is rather endorsed.[59] Effectively, one religion is favoured over the others, resulting in differential and unequal treatment.[60] The state also aligns itself with a particular religion, impairing the legitimacy of the state as representative of all its citizens. Followers of minority religions or non-religious people become alienated from the state as they are not afforded the same privileges as the established or the endorsed church.

The practice of allowing public holidays on the sacred days of the established or endorsed religion illustrates this dilemma. Allowance is made for everyone in the country to celebrate the religious days of the established or endorsed religion – regardless of whether adherents to the minority religions wish to participate in this practice. When the followers of the divergent religions want to celebrate a religious day, they have to stay home from school or take leave from work. Their ability to fully enjoy their religion is thus inhibited and placed on an unequal footing in relation to the majority religion.

---

[52] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 152.
[53] Farlam "Freedom of religion, belief and opinion" in Woolman *CLOSA* 41-26.
[54] Durham "Perspectives on Religious Liberty" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 20.
[55] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 152.
[56] Durham "Perspectives on Religious Liberty" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 20.
[57] Farlam "Freedom of religion, opinion and belief" in Woolman *CLOSA* 41-26.
[58] 20.
[59] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 152.
[60] J Temperman *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (2010) 161-167.

In pre-constitutional South Africa, there was never an established church,[61] but close ties existed between the state and Christian churches, especially the Dutch Reformed Church. This relationship will be discussed in more detail below, but at this point it is sufficient to say that remnants of the relationship are still evident in South Africa today. The practice of allowing public holidays to coincide with the religious days of Christianity illustrates this phenomenon.[62] Under the Constitution it would be highly inappropriate for the state to align itself with a particular religion or to endorse a particular church. Just as with the theocratic model, the establishment and endorsement models raise concerns regarding the infringement of the rights to equality, religious freedom and human dignity.

2 3 Separation between the state and religion

As with most of the other models of state-religion interaction, the separation model refers to a diverse range of regimes.[63] Although the majority of countries in the world today adopt at least some form of separation between religion and the state,[64] this model will manifest differently in every country. This makes it difficult to identify uniform characteristics. The separation model suggests that there must be a complete separation between the secular state, and religion and the church. In some countries this separation is enforced with such vigour that the state can be perceived to be intolerant or hostile towards the religious practices of its citizens.[65]

Such a strict separation can see the state almost promoting a secular ideology at the expense of the convictions of religious communities.[66] In 2004 the French National Assembly enacted a law banning "conspicuous" religious symbols in schools.[67] The law effectively bans learners from wearing any religious garments such as the headscarf associated with the Muslim faith. The ban is based on the strictly secular nature of the French state which views religion as a private matter and aims to ensure that the public sphere is devoid of religious expression. As the Western European country with the largest Muslim community,[68] France

[61] J van der Vyver "Constitutional Perspectives of Church-State Relations in South Africa" (2001) 8 *Brigham Young University Law Review* 635 639.
[62] Examples in this regard are Good Friday and Christmas Day.
[63] Durham "Perspectives on Religious Liberty" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 23.
[64] Smith "South Africa's Developing Model of Religion-State Relations" *Occasional Paper* 3.
[65] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 153.
[66] 153.
[67] J Henley "French MPs vote for veil ban in state schools" (11-02-2014) *The Guardian* <https://www.theguardian.com/world/2004/feb/11/schools.schoolsworldwide> 1 (accessed 17-10-2016).
[68] BBC "European Court upholds French veil ban" (01-07-2014) *BBC* <http://www.bbc.com/news/world-europe-28106900> 1 (accessed 10-06-2015).

has been criticised for infringing on the rights of religious minority groups, illustrating the dangers of a too vigorous enforcement of separation.

In the most extreme cases the separation model can see the state making strong attempts to establish a clear distinction between public life and private life.[69] Any state involvement with religious activities or suggestion of public support for religion would be considered inappropriate,[70] and religious observances in public schools will not be allowed as it infringes the division between the public and the private sphere. Some states allow their citizens to establish private schools with a religious character, but others demand a complete monopoly of the education system – not allowing parents to educate their children in accordance with their religious convictions. In these states religious freedom is substantially limited and reserved for the private sphere.

The separation model may however also develop as a result of the state's reverence towards religion and the need to treat all religions on an equal basis, without interference or control by the public sphere. In these countries the intention of the state is to remain neutral in respect of competing conceptions of the "good" and to refrain from justifying its actions by invoking a particular religion.[71] The advantage of such an approach is that the legitimacy of the state is protected as all religions are afforded the same status in the public realm and followers of minority religions are not indirectly coerced towards a preferred religion. The United States of America provide a useful example in this regard. The First Amendment of the Constitution of the United States of America states that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." The first part, which is known as the "Establishment" clause, erects a wall of separation between the state and religion,[72] while the second part allows for the free exercise of religion.[73]

In the American context, it seems that the state, and especially the courts, has struggled to come to grips with the contradiction created by the First Amendment. Problems tend to arise when religious practices filter into institutions traditionally associated with the public sphere. The jurisprudence of the United States Supreme Court illustrates the struggle to strike a balance between the state as a secular institution and the rights of people to be religious in the public sphere. Religious instruction on public school premises was outlawed in *McCollum v*

[69] Durham "Perspectives on Religious Liberty" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 22.
[70] Farlam "Freedom of Religion, belief and opinion" in Woolman *CLOSA* 41-26.
[71] Temperman *State-Religion Relationships and Human Rights Law* 140.
[72] Van der Vyver "Introduction" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* xxii.
[73] Meyerson *Rights Limited* 2.

*Board of Education*,[74] and a daily period of silence in public schools, dedicated to voluntary meditation or private prayer,[75] was declared unconstitutional. Conversely, religious colleges are allowed to use federal funds for capital projects,[76] while a religiously motivated rule prohibiting dancing by students on school grounds was found to be constitutional.[77] From these brief examples, it is clear that attempts by the United States Supreme Court to reduce the First Amendment to a consistent and universally applicable principle have thus far been unsuccessful,[78] and in a sense serve to illustrate the difficulties associated with the separation model.

The separation model fails to appreciate and accommodate the inevitable "dialectical interdependence"[79] of law and religion.[80] Religion cannot be confined to the private sphere alone, because people, and by implication their religious convictions, are not confined to the private sphere. A necessary overlap must occur. Bilchitz and Williams[81] use the example of someone walking in the town square dressed in religious apparel. The choice of clothing was a deeply personal decision, taken within the confines of the private sphere, but once he leaves his home he carries his religion into the public sphere.[82] A strict separation between religion and the law seems almost impossible[83] and even if it could be attained, it would constitute a severe infringement on the religious freedom of those that are religious. By restricting their religion to the private sphere, the state requires them to leave behind an essential part of their identity the moment they engage in the public domain. This is not only a clear violation of religious freedom, but also subjects religious followers to unequal treatment.[84] They are expected to compartmentalise their identities,[85] while those who do not adhere to any religion need not separate their private and public lives in quite such a severe way.

The danger in states that profess an absolute separation is that the state can be perceived to advocate secularism. The right to religion is not only a positive right, but also manifests as a negative right, allowing people to be free to choose not to be religious. Non-religious citizens and their decision not to be religious are thus given preference over those who are religious in

---

[74] 333 U.S. 203 (1948).
[75] *Wallace v Jaffree*, 472 U.S. 38 (1985) ("*Wallace*").
[76] *Tilton v Richardson*, 403 U.S. 672 (1971).
[77] *Clayton v Place*, 884 F.2d. 192 (8th Cir., 1989).
[78] Van der Vyver "Introduction" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* xxvii.
[79] HJ Berman *The Interaction of Law and Religion* (1974) 78.
[80] Van der Vyver "Introduction" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* xxix.
[81] "Religion and the public sphere" *SAJHR* 155.
[82] 155.
[83] 155.
[84] 155.
[85] 155.

the country. Ultimately, religious followers are directly (the case of France comes to mind) and indirectly coerced into secularism. Just like the theocratic model, this model erodes the legitimacy of the state as many religious people feel alienated[86] and unable to identify with an institution that so fundamentally denies the convictions they hold sacred.

From the outset, it is quite clear that the South African Constitution never envisioned an absolute separation between the state and religion[87] and the application of this model in the South African context would raise constitutional concerns. Prohibiting people from any form of religious practices in the public sphere will constitute an infringement of their right to religious freedom, equality and human dignity and will result in a denial of an integral part of the identity of the South African community. Certain elements of the separation model is however present in the South African model of state-religion interaction. At least some degree of separation is envisioned by the Constitution, in the sense that the state cannot affiliate itself with a particular religion, but must attempt to treat all religions on an equitable basis and refrain from directly or indirectly coercing people towards a chosen religion.

### 2 4 Accommodation and cooperation models

The accommodation and cooperation models are also sometimes referred to as models of separation with considerable interaction[88] between the state and religion. They will be considered together as they share many of the same features, but only a brief discussion of the general characteristics will be provided as their manifestation in the South African context will be addressed in more depth below. The core of these models is that states accommodate religions, and cooperate and interrelate with them, without affording a particular religion preferential treatment.[89] There is a great deal of overlap between the two models, but Durham[90] distinguishes them on the basis that countries that follow the cooperationist model, allow for the state to provide direct financial subsidies to religion or religion education. In countries with an accommodation model, the state is not necessarily financially involved in the promotion of religion or religious education.[91]

The accommodation model envisions a separation between the state and religion, but provides for a degree of endeavour by the state to accommodate those that are religious in the

[86] 155.
[87] Section 15(2) of the Constitution.
[88] Smith "South Africa's Developing Model of Religion-State Relations" *Occasional Paper* 4.
[89] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 156.
[90] "Perspectives on Religious Liberty" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 21.
[91] 21.

public sphere.[92] The state remains neutral towards religion, but accommodates persons that have specific requirements or needs associated with their religion[93] in an effort to fully realise their right to religious freedom. In accommodation regimes the importance of national or local religious culture is appreciated, religious symbols in public settings are tolerated and exemptions like dietary needs or religious holidays are allowed.[94] Germany[95] and Botswana[96] are good examples of countries that have an accommodation model of state religion interaction.

The cooperation model extends further than this, as no special status is granted to a specific church or religion,[97] but there is an active and cooperative relationship between the state and religion. Interaction between the two domains is not limited to accommodating the needs of religious communities, but entails a working relationship between the state and religion.[98] Although the state regards itself as religiously neutral, cooperationist countries often assist and aid larger denominations.[99] This can take the form of funding for church-related activities such as religious education or the payment of church officials.[100]

The cooperation model can however present a few challenges in a constitutional democracy. Different religions have different needs and this can lead to an uneven dispersal of assistance.[101] It is also easy for the state to fall into a pattern of preference in which the majority religion or the religion the state associates with most is afforded advantages over other religions.[102] It is in light of these concerns, that authors like Durham,[103] Farlam[104] and Bilchitz and Williams[105] prefer the accommodation model as the one most likely to give effect to the constitutional vision of freedom of religion. By not refraining from involvement with religion, the state can actively advance the religious identities of its citizens.[106] This is

---

[92] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 156.
[93] 156.
[94] Durham "Perspectives on Religious Liberty" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 21.
[95] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 157.
[96] Smith "South Africa's Developing Model of Religion-State Relations" *Occasional Paper* 6.
[97] Durham "Perspectives on Religious Liberty" in Van der Vyfer & Witte *Religious Human Rights in Global Perspective* 20.
[98] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 156.
[99] Durham "Perspectives on Religious Liberty" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 21.
[100] 20.
[101] 21.
[102] 21.
[103] "Perspectives on Religious Liberty" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 21.
[104] "Freedom of religion, opinion and belief" in Woolman *CLOSA*.
[105] "Religion and the public sphere" *SAJHR* 157.
[106] 157.

done on an equitable basis, where, unlike the separationist model in which the state refrains from any involvement in religion, the state now pursues a relationship with religions on equal terms.[107]

What exactly constitutes equal terms or treatment is however unclear and poses the greatest challenge to states that adopt the accommodation model. Different religions have different needs (both financially and socially) and it can become very difficult for a state to disperse its resources in such a way that all religions feel they are being treated the same. As has already been mentioned, section 15(2) of the Constitution also make provision for the conducting of religious observances in state and state-aided institutions, so long as it is done on an "equitable basis."

The requirement of "equity" is thus also used within the South African context and giving content to it will form the cornerstone in determining how the state-religion relationship in South Africa should function. In order to determine the exact content of the accommodation model in South Africa, the Constitution, legislation and the judiciary's approach to religious rights cases have to be analysed. The goal is to interpret and construct the historical and social context in which the Constitution exists, so as to determine the exact ambit of South Africa's unique accommodation model.[108] What follows is a historical overview of the relationship between the state and religion in the pre-constitutional era.

## 3 State-religion relations in the pre-constitutional era

### 3 1 Colonisation and religion in South Africa

Determining the relationship between the state and religion in pre-constitutional South Africa presents a few difficulties. Not only was it an ever-changing relationship, but it was also considerably influenced by the tumultuous political climate that accompanied the colonial occupation of South Africa in 1652.[109] Before the advent of colonial rule most people lived in accordance with indigenous religions and traditional customary law.[110] The arrival of the Dutch East India Company in 1652 not only meant a radical transformation of the social, cultural and political situation of the indigenous people of South Africa, but also coincided with the arrival of Christianity.[111] The traditional African religions were not left

[107] 157.
[108] 159.
[109] P Coertzen "Freedom of Religion in South Africa: Then and Now 1652-2008" (2008) 29 *Verbum Et Ecclesia JRG* 345 349.
[110] PM Lenaghan "Restoring the 'Historical Deficit': The Exercise of the Right to Freedom of Religion and Culture in Democratic South Africa" (2013) 29 *South African Journal of Human Rights* 294 301.
[111] 300.

untouched and the presence of Christian missionaries and the state's paternalistic endorsement of a particular European Christian worldview, ensured that many African religious traditions were regarded as incompatible with Christianity and unacceptable in the eyes of the colonial state.[112] A particular Christian conception of "the good" was imposed on the indigenous people of South Africa and consequently the relationship between the state and the church also became a reflection of the race relations in the country.[113]

During the first 150 years of Dutch colonisation, there was considerable interaction between the state and the Dutch Reformed Church, with the Political Council and the Commander of the Cape exerting a great amount of power over the internal affairs of the Church.[114] Pillay[115] goes as far as to describe it as a "state church", suggesting that South Africa showed signs of the theocratic model of state-religion interaction. The Dutch East Indian Company even prohibited the existence of any other religion in the Cape until 1778.[116] Pillay's argument seems plausible considering the extent of interference of the state in religious matters. From 1652-1665 the Political Council, under the leadership of the Commander, was responsible for the religious and spiritual care of the people of the Cape.[117]

In 1665, the Cape got its first permanent minister and church council, shifting the responsibility of spiritual care to the church.[118] In reality, power over religious affairs still resided with the Political Council as all decisions made by the church council had to be submitted to the Political Council for consideration.[119] Furthermore, the Political Council still elected elders and deacons in the church, while Political Commissioners represented the Political Council at all meetings of the church.[120] The Political Council even played a role in the day-to-day running of the church, decided the time and place of worship, built new churches and decided whether heathen children could be baptised.[121] This relationship continued all through the 1700s and in a sense the church was what Vorster[122] describes as a mere "engine of the State," always subordinate to the Political Council.

---

[112] 301.
[113] Coertzen "Freedom of Religion in South Africa" *Verbum Et Ecclesia JRG* 346.
[114] 350.
[115] "Church, State and Christian Pluralism in South Africa: A historical overview" (1995) 21 *Studia Historiae Ecclesiasticae* 41.
[116] Lenaghan "Restoring the 'Historical Deficit'" *SAJHR* 300.
[117] JD Vorster *Die Kerkregtelike Ontwikkeling van die Kaapse Kerk onder die Kompanjie 1652-1792* (1956) 38.
[118] Coertzen "Freedom of Religion in South Africa" *Verbum Et Ecclesia JRG* 350.
[119] 351.
[120] 351.
[121] 351.
[122] *Die Kerkregtelike Ontwikkeling van die Kaapse Kerk onder die Kompanjie* 39.

The British occupation of the Cape in 1795, and again in 1806, heralded the start of a more tolerant policy towards religion,[123] although the relationship between the state and the church remained intertwined. Initially, it was guaranteed that no exceptional changes would be made to church-state relations and the practice of allowing the Political Commissioner a seat on the church council continued.[124] Deacons and elders still had to be approved and the official functions of church ministers were completely controlled by the government.[125] In 1843 Ordinance 7 of 1843 was passed in an effort to make the church more free from government involvement with the goal of eventually separating the two domains.[126] The church finally received the power to organise its own internal affairs, but the government still exerted financial control over the church as well as retaining the power to appoint the ministers to congregation.[127] This Ordinance was only revoked on 21 October 1957, when the Dutch Reformed Church declared itself as an independent body free from government regulation.[128]

Within the education system, developments in the early 1900s paved the way for the creation of a system of Christian nationalist education that would later form an integral part of the apartheid ideology. After the end of the South African War in 1902, there was a great urge for self-determination amongst the Afrikaans Christian community in South Africa.[129] Under British rule, education in state schools had a distinct Anglican nature and especially through Lord Milner's government, the aim was to anglicise the children of the Afrikaner community. In response to this, private church-supported schools were established with a view to furthering Christian National Education. Once responsible governments were appointed in each of the colonies, these schools became integrated into the state education system.[130] Under British imperialism, the Dutch Reformed Church had come under pressure from the largely Anglican government.

The Dutch Reformed Church utilised the discontent with British colonial rule as the basis for restoring the church as an important player in the affairs of the country.[131] The rise of Afrikaner Nationalism thus coincided with the revival of the Dutch Reformed Christian

[123] Coertzen "Freedom of Religion in South Africa" *Verbum Et Ecclesia JRG* 346.
[124] 352.
[125] 352.
[126] 352.
[127] 352.
[128] EPJ Kleynhans *Die kerkregtelike ontwikkeling van die Nederduitse Gereformeerde Kerk in Suid-Afrika 1759-1962: 'n Kerhistoriese-kerkregtelike studie* (1973) 95.
[129] TD Moodie *The Rise of Afrikanerdom* (1975) 105.
[130] 105.
[131] JW Gruchy "The Relationship between the State and some Churches in South Africa, 1968-1975" (1977) 19 *Journal of Church and State* 437 440.

theology and this established the basis for the alliance that existed between the state and the Dutch Reformed Church during apartheid.

The dominant position of Christianity during the colonial era in South Africa also had an immense impact on the religious freedom of adherents of minority religions. Furthermore, the unequal treatment of the non-Christian religions also manifested in the unequal treatment of racial groups. Traditional African religions were regarded as degenerate, and were consequently subverted by the state. Age old practices like African dances, marriage ceremonies and actions of traditional worship were regarded as incompatible with Christianity and prohibited under colonial rule.[132]

On an institutional level attempts were made by the government to strengthen the Christian faith amongst the traditional communities and the slaves that fell victim to the formal slave trade in the country. An ordinance that was passed in 1770 prohibited the buying or selling of slaves that had converted to Christianity. This was an attempt to encourage conversion amongst the traditional groups, but slave-owners tended to exclude their slaves from Christian conversion or baptism in order to retain property rights over them.[133] The indigenous people of South Africa held a subordinate position in society and the discrimination they experienced was intensified by their religious convictions.

It was not only traditional African religions that suffered under colonial rule, but adherents of religions like Islam and Buddhism were also treated unequally In 1856, the Muslim religious festival of Khalifa was banned as "dangerous to the law and the peace of the community"[134] and permission to build a mosque in South Africa was only granted in the late 1700s.[135] Over time, the colonial courts were given permission to apply the customary law of the indigenous communities and give recognition to certain religious practices as far as they were not "repugnant to the general principles of humanity observed throughout the civilised world."[136] This rather widely phrased discretion meant that the courts could elect the laws they wished to apply with reference to their own conception of civility. Under this Proclamation customary marriages and *lobola* agreements were not recognised because polygamy and the paying of an amount of money to wed someone were regarded as unacceptable in a civilised society.[137]

---

[132] Leneghan "Restoring the 'Historical Deficit'" *SAJHR* 301.
[133] D Chidester *Religions of South Africa* (1992) 35.
[134] 162.
[135] Leneghan "Restoring the 'Historical Deficit'" *SAJHR* 301.
[136] Section 23 of Proclamation 110 & 112 of 1879.
[137] Leneghan "Restoring the 'Historical Deficit'" *SAJHR* 302.

It is thus clear the discrimination based on religion went hand in hand with discrimination based on race. This phenomenon came to head under the apartheid system where religion, and specifically the Dutch Reformed Church, was masterfully used to justify the policy of racial segregation that marked the apartheid era.

3 2 Religion and the apartheid state

In 1948 the National Party (NP) came into power and soon started to implement its policy of racial segregation and separate development. This marked the beginning of an era that would see widespread violence, discrimination and human rights abuses. It also signalled the beginning of an interesting and quite tumultuous time in the relationship between the state and religion. As already mentioned, there was no established church in South Africa[138] during the apartheid era and to a large extent other religions were tolerated as long as they did not interfere with the policies of the state and did not pose a threat to the NP[139] In practice, the relationship between the state and the different churches proved to be strained and marred by conflict. On the one hand the three Afrikaans churches,[140] and more particularly the Dutch Reformed Church, provided the theological framework and justification for apartheid;[141] while on the other hand, missionaries concerned with the wellbeing of black people in South Africa, the traditional black churches[142] and more liberal members of the traditional white churches,[143] vehemently opposed the apartheid system.

Internationally, churches and religious leaders condemned the South African government for its blatant disregard for human rights, joining the voices within the South African religious community that began to warn against the violent system of racial segregation imposed by the government.[144] Opponents of the government, religious or not, were however not treated kindly and church leaders and members were regularly detained or banned

[138] Van der Vyver "Constitutional Perspectives of Church-State Relations in South Africa" *Brigham Young University Law Review* 639.
[139] Coertzen "Freedom of Religion in South Africa" *Verbum Et Ecclesia JRG* 352.
[140] Dutch Reformed Church, Nederduits Hervormde Church and Gereformeerde Church.
[141] LM du Plessis "Religious Human Rights in South Africa" in JD van der Vyver & J Witte (eds) *Religious Human Rights in Global Perspective* (1996) 441 442; HPP Lotter "Religion and Politics in a Transforming South Africa" (1992) 34 *Journal of Church and State* 75 475.
[142] Especially the member churches of the South African Council of Churches that included the Anglican, Congressional, Methodist, Presbyterian and some Lutheran churches. For more information see Gruchy "The relationship between the state and some churches in South Africa" *Journal of Church and State*.
[143] In this respect members of the Dutch Reformed Church like Reverend Beyers Naude and of the Nederduits Hervormde Church like Professor Albert Geyser, come to mind.
[144] Gruchy "The Relationship between the State and some Churches in South Africa" *Journal of Church and State* 444.

without a trial, denied passports or placed under house arrest.[145] Missionaries known to be against the government policy were denied entry into the country, while church offices were raided by the Security Police and publications confiscated or banned.[146] The apartheid regime justified their actions by arguing that they were not opposed to the church per se, but rather individual members using the guise of religion to further their anti-governmental objectives. Subtle forms of intimidation were also used by the state, with the government-controlled media often referring to certain churches as "leftists" or "supporters of terrorism,"[147] using insinuations to damage the public's perception of the church.

The state also used legislation to interfere in the internal affairs of religious bodies.[148] One of the most notorious examples is the so-called "church clause" which was section 9(7) of the Blacks (Urban Areas) Consolidation Act 1957. This section conferred on the Minister of Co-operation and Development the power to prohibit blacks from attending church services and functions in areas occupied by non-blacks.[149] Universal outcry from all religious institutions, including the government supported Dutch Reformed Church, led to the section never being enacted,[150] but it illustrated how far the government was willing to go to implement its policy of racial segregation. Furthermore, the repression of religions institutions was conducted under the guise of security legislation.[151] Religious organisations could be declared unlawful and banned under the Internal Security Act 74 of 1982 in terms of which the Minister of Law and Order could form an opinion on whether the organisation engaged in activities that endangered the security of the state or the maintenance of law and order.

Other pieces of legislation were not necessarily aimed at religious organisations, but used Christianity as a way of justifying the rules imposed by the state, or abused legislation to impose the government's unique brand of "the good" onto South Africans. Two such pieces of legislation were the Prohibition of Mixed Marriages Act 55 of 1949 and the Immorality Act 23 of 1957, which prohibited marriages and relationships between people of different races. By enacting these laws, the state ventured deep into the private sphere, effectively attempting to control the social dimension of its citizens' lives. The fact that the decision was

---

[145] 444.
[146] 444.
[147] 444.
[148] Van der Vyver "Constitutional Perspectives on State-Religion Interaction in South Africa" *Brigham Young University Law Review* 639.
[149] Du Plessis "Religious Human Rights in South Africa" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 446.
[150] Van der Vyver "Constitutional Perspectives on State-Religion Interaction in South Africa" *Brigham Young University Law Review* 640.
[151] 640.

theologically substantiated illustrated the extent to which Christianity and the state had become intertwined.[152]

As has already been mentioned, a special relationship existed between the state and the Dutch Reformed Church which, to a large extent, justified and legitimised the apartheid regime. As was explained above, the rise of Afrikaner nationalism and the Nationalist Party coincided with the revival of the Dutch Reformed Church, which at that stage had a distinct Afrikaner identity, resulting in the theology of the church being termed the "Afrikaner civil religion."[153] In 1960, following the Cottesloe deliberation between delegates from different churches in South Africa, as well as the World Council of Churches, the Dutch Reformed Church issued a statement in which it confirmed the government's policy of differentiation and rejected any form of integration.[154] It also viewed it as the task of the church to test the government against the principles of Scripture and to ensure that the state acted in accordance with the Christian conception of the "good."[155]

As the devastating realities of apartheid became more apparent and the state intensified its efforts to implement the policy of separate development, the relationship between the state and the Dutch Reformed Church started changing. Initially, the victims of apartheid and the more liberal churches in South Africa criticised the state's theological justification for the system of white supremacy,[156] alluding to the fact that apartheid contradicts much of what the Christian faith proclaims about the nature of the church and its role in attending to all people alike.[157] Within the ranks of the Dutch Reformed Church, a great deal of introspection was done after the Cottesloe deliberations and in 1962 the General Synod was created in an attempt to re-evaluate the role of the church in the South African society.[158] The first Church Order of the General Synod in 1962 proclaimed the church to be independent from the state, but it still considered itself to be under the general protection of the state.[159] It almost seems as if the church attempted to strike a balance between its evangelical role as a Christian

---

[152] Du Plessis "Religion, law and the state in South Africa" *European Journal for State and Church Research* 225.
[153] Du Plessis "Religious Human Rights in South Africa" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 446.
[154] Coertzen "Freedom of Religion in South Africa" *Verbum Et Ecclesia JRG* 354.
[155] 354.
[156] Du Plessis "Religious Human Rights in South Africa" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 447.
[157] Gruchy "The Relationship between the State and Some Churches in South Africa" *Journal of Church and State* 443.
[158] Coertzen "Freedom of Religion in South Africa" *Verbum Et Ecclesia JRG* 355.
[159] 356.

institution and the preservation of the mutually beneficial relationship it enjoyed with the apartheid government.

By the 1980s the church had however become much more critical of the government and the relationship between the two institutions was mostly maintained by the conservative wing of the church order. Publically, the church started to condemn the action of the apartheid regime and at the 1982 synod the Dutch Reformed Mission Church, which formed part of the Dutch Reformed Church, condemned the theological justification of apartheid as a heresy.[160] The document, *Kerk en Samelewing,* was adopted by the General Synod in 1986 in which the church rejected apartheid as a system that unfairly benefits one group over another and criticised attempts to justify apartheid with reference to Scripture.[161]

Interestingly, the church also rejected racism stating that it strips people of their human dignity, duties and rights and justifies oppression and exploitation.[162] The language employed in this part of the document illustrates the extent to which the church had at that point moved away from their initial relationship with the state. The Dutch Reformed Church realised that it could no longer be the handmaiden of the state.[163] Within government structures, the winds of change were however also about and the escalating violence in the country, states of emergency and international pressure, were the final nails in the apartheid coffin.

## 4 Religion and education before 1994

The previous section dealt extensively with the relationship between the state and religion in South Africa before the promulgation of the Constitution.[164] While it is quite evident that religion, and especially Christianity, had a profound impact on the functioning of the state, this interaction was particularly apparent within the realm of education. Before 1652 the indigenous tribes in South Africa practised an informal type of education.[165] The advent of colonial rule in the Cape introduced a process of Christianisation, and although initial efforts at evangelising and educating the indigenous people were fragmented,[166] the occupation of the Cape in 1795 by the British saw a surge in missionary activity.[167] The Moravian Church

[160] Du Plessis "Religious Human Rights in South Africa" in Van der Vyver & Witte *Religious Human Rights in Global Perspective* 447.
[161] Lotter "Religion and Politics in a Changing South Africa" *Journal of Church and State* 481.
[162] 481.
[163] Coertzen "Freedom of Religion in South Africa" *Verbum Et Ecclesia JRG* 357.
[164] See Chapter 2.
[165] PC Luthuli *The philosophical foundations of black education in South Africa* (1981) 54-5.
[166] A Lewis & JC Steyn "A critique of mission education in South Africa according to Bosch's mission paradigm theory" (2003) 23 *South African Journal of Education* 101 103.
[167] A Lewis *Past and present perceptions surrounding mission education: A historical metabletical overview*

was the first Protestant mission society to evangelise and educate at the Cape in 1737, and by 1799 several other mission societies had joined them.[168] Missionaries believed Christianity to be superior to the "heathen" religions practiced by the indigenous people and regarded it as their duty to proselytise them towards Christianity.[169]

Initially, the British government did not financially support the endeavours of the mission societies and it was only by 1841 that mission education became partially financed.[170] This was mainly to ensure government control of the education provided to indigenous people[171] and resulted from the realisation that education could be utilised to ensure the establishment of British imperialism and culture.[172] Schools were gradually Anglicised and by the mid-nineteenth century[173] the relationship between the government and missions schools had become one of mutual benefit, with the schools receiving much-needed financial support, while the government expanded its control of the indigenous people.

Children who attended mission schools (often against their will) were subjected to a Western system of education that differed vastly from the education they had received in the indigenous communities.[174] Their own religions were regarded as heathen while their education systems were negated, vilified and viewed as inferior to the education the government and the church could provide.[175] In a sense mission schools served both a public and particular private interests. The missionaries regarded the creation of a Christian society as important for the public good, while the British government used the education system to achieve their private political goals and establish imperial rule.[176]

By the late nineteenth century the government's policy of racial segregation had filtered into the realm of mission education and these schools became part of an institutionalised policy of discrimination against black indigenous people.[177] Perceptions of the intellectual inferiority of black people were common among the missionaries and the government alike, and a lack of resources in mission schools provided most black people with an inferior

---

(1999) D.Ed thesis Stellenbosch: University of Stellenbosch 82.

[168] J du Plessis *A history of Christian missions in South Africa* (1911) 45.

[169] Lewis & Steyn "A critique of mission education in South Africa" *South African Journal of Education* 101103.

[170] 103.

[171] 103.

[172] V Msila "From apartheid education to the revised national curriculum statement: Pedagogy for identity formation and nation building in South Africa" (2007) 16 *Nordic Journal of African Studies* 146 147.

[173] Lewis & Steyn "A critique of mission education in South Africa" *South African Journal of Education* 104.

[174] 103.

[175] 103.

[176] 103.

[177] 104.

education[178] or no education at all.[179] By 1910 almost all schools for indigenous people were run by missionaries[180] - a situation that was only addressed after the NP came to power in 1948. From the inception of colonial rule, black people in South Africa had thus been subjected to a system of education that was inseparably entwined with Christianity. While the missionaries initially saw it as their duty to educate the indigenous people in accordance with Christianity, mission education later became a powerful mechanism for social and racial segregation.

Parallel to the establishment of the British system of mission education, another system was developing in South Africa that would eventually prove to be one of the corner stones of the apartheid regime. Influenced by the Calvinist doctrine of the Dutch Reformed Church, and in reaction to the Anglicisation of schools by the British colonial government, the early Dutch settlers established schools to reflect their own religious convictions and cultural practices.[181] Education in these schools was influenced by the Christian values of the Dutch Reformed Church and unlike the mission schools they managed, for the most part, to remain exempt from government control.

By the 1800s these schools were still in the complete control of parents and the church.[182] Over time, these Dutch descendants started to form their own cultural identity and the South African War (Anglo-Boer War) between the British and the Afrikaners (1899-1902) was in many ways a reflection of the disconnect that existed between the colonial government and the descendants of the previous colonisers.[183] This led the way for the establishment of the first schools based on the policy of Christian National Education (CNE)[184] – a step that reflected the growing nationalist ideology that was developing among the Afrikaner community.

By the beginning of the 1900s the South African education system was a tapestry of different institutions, each reflecting a particular religious and political ideology. In an attempt to create a measure of unity, all education (with the exception of higher education

---

[178] Lewis & Steyn "A critique of mission education in South Africa" *South African Journal of Education* 104.
[179] By 1905 only 2.1% of the whole indigenous African population were in school and their education was limited to primary school education only.
[180] K Hartshorne *Crises and Challenge: Black education 1910-1990* (1992) 25. See R Elphick *The Equality of Believers: Protestant missionaries and the racial politics of South Africa* (2012). In 1926, 2702 missionary schools were educating around 215 856 pupils, while the government was only responsible for 68 schools.
[181] HJ van Aswegen *The history of South Africa to 1854* (1990) 184-90.
[182] Msila "From apartheid education to the revised national curriculum statement" *Nordic Journal of African Studies* 148.
[183] 148.
[184] B Blumfield "A Timeline of South African events in Education in the Twentieth Century: 1900-1999 (2008) <http://sahistoryofeducation.webs.com/sa%20timeline.pdf> (accessed 14-04-2015).

that was in the hands of the Union Parliament)[185] was handed over to provincial administration on 31 May 1910.[186] Practically, however, the missionaries still administrated the education of black pupils,[187] while the schools for Afrikaans speaking children continued to be controlled by parents and the Dutch Reformed Church. The years following the unionisation of South Africa saw the gradual political rise of the Afrikaner community and the expansion of its policy of Christian nationalism. This, just like the arrival of the first European settlers, would again have a dramatic impact on the relationship between religion and education in South Africa. The election of the NP in 1948 saw the government organising the education system to reflect the entwined model of state-religion interaction that prevailed during the apartheid years.

In 1939, at a conference held by the Federasie van Afrikaanse Kultuurvereninge (FAK), the Institute of Christian-National Education (ICNE) was formed in an attempt to further the ideals of Christian National education. Under the guidance of the ICNE, the Christian National Education policy was published in 1948 and on 17 November 1948, the congress of the NP adopted a resolution that the country's education policy should conform to the ICNE's version of CNE.[188] The CNE policy was based on two central features, the first being that all education must be based on the Christian faith and secondly that humanity was divided into nations and that education should reflect the differences between them.[189] Section 2 of the policy stated that "religion should determine the spirit and direction of all other subjects" and "all instruction shall be founded on the Christian basis of life and world-view of our nation."

Allowance was made in the curriculum for religion education (where students were taught about different religions), but religion was not limited to a particular subject and the idea was that the entire education system must be influenced by and reflect the ideals of the Christian faith.[190] Even religion education had to be presented with a certain Christian

---

[185] ME McKerron *A History of Education in South Africa (1652–1932)* (1934) 50.
[186] MCE van Schoor "Onderwys in die Oranje-Vrystaat" in J Coetzee (ed) *Onderwys in Suid-Afrika, 1652-1960* (1963) 175.
[187] See Elphick *The Equality of Believers* 196-7 for a discussion on the state of mission education following the unionisation of South Africa in 1910.
[188] YI Eshak "'Authority' in Christian National Education and Fundamental Pedagogics" (1987) <http://www.sahistory.org.za/archive/authority-christian-national-education-and-fundamental-pedagogics yousuf-ismail-eshak-1987> (accessed 05-05-2015).
[189] MS Rakometsi *The transformation of black school education in South Africa, 1950-1994: A historical perspective* (2008) DPhil thesis Bloemfontein: University of the Free State 27.
[190] J Jarvis *The voice of the teacher in the context of religious freedom: a Kwazulu-Natal case study* (2008) Masters thesis Stellenbosch: University of Stellenbosch 3.

authoritarianism,[191] drawing on the notion that the followers of Christianity were somehow morally superior to those that adhere to "heathen" religions.

The model of Christianity propagated by the government was based on a very specific interpretation of Calvinism that accommodated the government's policy of racial segregation,[192] and in 1949[193] the Eiselen Commission[194] was established to look into black education.[195] The Eiselen Commission's recommendations[196] formed the basis for the promulgation of the Bantu Education Act 47 of 1953 ("Bantu Act").[197] In terms of the Bantu Act, education for black pupils had to be handed over to the Department of Bantu Education[198] that would replace the missionaries in the running of their schools. Provision was also made for schools to stay under missionary control, but they would forthwith have to do without any government subsidies.[199] Most of the missionary schools relied very heavily on the funding they received from government and the Bantu Act left them unable to function without forfeiting control.

The aim of the Act was essentially to align black education with the apartheid ideology[200] as the missionaries were perceived as unable to root black people within their own "tribal community."[201] One of the ways in which this was to be achieved was by implementing CNE in the sphere of black education.[202] This meant black education, that had previous been dominated by missionaries, would forthwith be under direct state control and strictly segregated in line with the values of Afrikaner Nationalism.[203] The National Education Policy Act 39 of 1967 made provision for education based on the principles of CNE to be conducted in the primary and secondary schools of white children.[204] Similarly, education in black and

---

[191] 3.
[192] Eshak "'Authority' in Christian National Education and Fundamental Pedagogics" <www.sahistory.org.za> (accessed 05-05-2015).
[193] By 1949 the number of mission schools had increased to around 4500.
[194] The commission was named after its chairman, Dr WWM Eiselen, a former inspector of Native Education in the Transvaal.
[195] I Naicker *Imbalance and Inequities in South African Education: A Historical-educational survey and appraisal* (1996) 51.
[196] See Union of South Africa *Report of the Native Education Commission 1949-1951* (1951) UG53-1951.
[197] Lewis & Steyn "A critique of mission education in South Africa" *South African Journal of Education* 105.
[198] This was a newly-established department tasked with administering education for the black people of South Africa.
[199] M Cross *Resistance and Transformation: Education, Culture and Reconstruction in South Africa* (1992) 222. By 1958 the government stopped funding mission education completely, causing many schools to close their doors or integrate with the government education system.
[200] Lewis & Steyn "A critique of mission education in South Africa" *South African Journal of Education* 105.
[201] 105.
[202] Rakometsi *Transformation of black education in South Africa* 60.
[203] 60.
[204] *Lawrence* para 149.

coloured schools had to have a Christian character.[205] The Coloured People's Education Act 47 of 1963 extended CNE to coloured schools,[206] while the Indian Education Act 61 of 1965 made provision for CNE in Indian schools.

Interestingly, the 1948 CNE policy contained no reference to the Indian community or the education of Indian children and even when the CNE curricula was extended to Indian education, special provision was made for the teaching of a subject called "Right Living".[207] This was an attempt to accommodate the special religious needs of the Indian community and Right Living focussed on universal values of morality rather than impose a distinctly Christian conception of the good. CNE was a mono-religious, confessional policy that had a devastating impact on the right to religious freedom. This was especially true for the learners, parents and teachers who were forced to learn and teach in accordance with a religious ideology they supported neither politically nor religiously.

The superior position enjoyed by Christianity inevitably coincided with the large scale marginalisation of other religions and those individuals who adhered to no religion at all. Even within the Christian faith, adherents who held viewpoints that differed from the very strict Calvinist model of CNE were ostracised and vilified as opponents of the government and the church. Indirectly, the religious marginalisation experienced by religions that deviated from the norm also became a manifestation of racial discrimination, social exclusion and political disempowerment.[208] CNE imparted the religious convictions of a small white minority on the majority of the white, black, coloured and Indian people of South Africa and in the process negated their rights to religious freedom, human dignity and equality.

Initial opposition to the Bantu Act was especially rife among non-student organisations outside educational institutions[209] with parents, teachers and pupils playing a somewhat marginal role in the fight against the CNE policy. By the 1960s it seemed as if opposition to CNE had subdued,[210] primarily as a result of the banning of prominent political organisations like the African National Congress (ANC) that drove the opposition movement in the 1950s.[211] However, increasing unemployment, a reduction in living standards and the deteriorating condition of Black education as a result of inadequate funding, led to an

[205] Para 149.
[206] F Troup *Forbidden Pastures: Education under Apartheid* (1976) 49.
[207] AE Janse van Vuuren *Religious Education in Secondary Schools* (1996) Master thesis Johannesburg: Rand Afrikaans University 32.
[208] *Lawrence* para 152.
[209] Rakometsi *The transformation of black education in South Africa* 172.
[210] 171.
[211] 172.

upheaval of organised political action from 1969 onwards.[212] Unlike the protests of the 1950s, the 1970s saw learners themselves actively engage in the anti-apartheid struggle. Parents, teachers and communities affected by the racist education system were mobilised in an attempt to dismantle Bantu education and the racist ideology that informed the policy.[213]

Opposition reached a historical climax when a mass protest of around 6000 school children in Soweto against the imposition of Afrikaans as a compulsory medium of education in black schools, erupted in a violent confrontation with the police.[214] The Soweto uprising of 16 June 1976[215] triggered riots and violent unrest that gradually spread throughout the country.[216] In many ways Soweto became a symbolic catalyst for the fight against the entire apartheid regime. In the aftermath of the Soweto uprising, the government abandoned its policy of compulsory Afrikaans instruction[217] and renamed the Department of Bantu Education to the more socially and politically acceptable Department of Education and Training.[218] The policy with respect to religious instruction in schools had however remained unchanged.

As the 1970s grew to a close, the situation in black education was more tumultuous than ever as learners continued to protest for equal education across all sectors of society.[219] In an attempt to curb the insistent violent protesting by learners, the government made education compulsory at the beginning of 1981.[220] This step was not met with the anticipated enthusiasm as the general consensus was that the acceptance of compulsory education would be tantamount to the acceptance of inferior education.[221] Consequently, the decision had quite the opposite effect, with learners, parents and teachers rather intensifying their opposition to the education policy. The imposition of mandatory education also did not coincide with a system of free education. Unable to afford the tuition the government levied on black education, many parents and children were inadvertently left in contravention of the law.

By the mid-1980s black education in South Africa was in crisis as learners continued to rebel and schools became both the battleground and the weapon of a youth movement that

---

[212] 172.
[213] 172.
[214] AL Behr *Education in South Africa: Origin, issues and trends, 1952-1988* (1988) 37.
[215] 16 June is now commemorated as Youth Day.
[216] Behr *Education in South Africa* 37.
[217] Rakometsi *The transformation of black education in South Africa* 226.
[218] 269.
[219] 288.
[220] 288.
[221] 288.

rallied under the slogan "Liberation first, Education later".[222] The government responded by closing educational institutions, arresting learners and dismissing teachers.[223] Amendments to the Education Affairs Act in June 1988 made it an offence for teachers to question, criticise or act against a law or state department.[224] These authoritarian measures led to the large scale occupation of schools and the intimidation of learners who were not involved in the struggle and teachers who refused to boycott the education system.[225] School property was also vandalised on a large scale, contributing to poor infrastructure and leaving many schools unable to provide even the most basic education to the remaining learners. A culture of anarchy and violent resistance ensued, devastating the educational prospects of most children who were either directly involved in the liberation movement, or simply bystanders of the call for transformation that was resonating throughout South Africa.

By the end of the 1980s the political situation in South Africa had become untenable. Secret meetings between some of the imprisoned ANC leaders and the NP government started in July 1984 already,[226] as the government realised it could no longer control the perpetual violence or handle the political pressure from both within the country and internationally. On 5 July 1989, then President PW Botha and imprisoned ANC leader, Nelson Mandela, met face to face in an effort to negotiate a settlement for the ANC's political demands. On 2 February 1990, President FW de Klerk announced the unbanning of all political organisations. The way was paved for the development of a democratic South Africa, and more importantly, the formulation of a Constitution that would ensure that the atrocities of the past would never be repeated. As a result of the problematic relationship that existed between the state and the church under apartheid, the formulation of a section dealing with religion was one of the difficult challenges facing constitutional drafters.

## 5 Freedom of religion under the Constitution

### 5 1 Drafting the Constitution

One of the main reasons why the apartheid government could maintain the apartheid system for so long was the absence of a supreme constitution that could counter the abuses of Parliament. The Conference for a Democratic South Africa (CODESA) commenced on 20 December 1991, consisting of representatives of political parties, liberation movements, the

[222] 312.
[223] 312.
[224] 322.
[225] 312.
[226] 393.

NP and governments of the former homelands.[227] The aim of CODESA was to negotiate the process of democratisation in South Africa and, importantly, to formulate constitutional principles that would form the basis for the drafting of a final constitution.[228] The CODESA negotiations broke down in mid-1992 as a result of a stalemate over the constitution-making process.

The ANC wanted the constitution to be drafted by a democratically elected body, while the NP, who knew they would lose a democratic election, wanted to negotiate over the content of the constitution.[229] A proposal by Joe Slovo, the leader of the South African Communist Party, that executive power-sharing for an agreed number of years after the adoption of a democratic constitution, should be compulsory, finally broke the stalemate.[230] The Multi-Party Negotiation Process was a follow-up to CODESA, and was tasked with formulating an Interim Constitution that would provide for the first democratic elections in South Africa. The Interim Constitution came into power on 27 April 1994 and marked the end of parliamentary supremacy.[231]

The new Parliament elected under the Interim Constitution had the dual role of acting as both the legislature and the Constitutional Assembly, mandated to formulate the Final Constitution. During the Multi-Party Negotiation Process, 34 constitutional principles were agreed upon by the parties and these principles had to inform the Final Constitution. The final draft of the Constitution then had to be presented to the newly established Constitutional Court for certification after which the Final Constitution would come into power. The Constitutional Court, in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996*[232] rejected the first draft for not adhering to the 34 constitutional principles. After adapting the text in accordance with the judgment, the Constitutional Court certified the Final Constitution on 8 May 1996.[233]

On the education front things were also changing. As discriminatory laws were abolished, schools that were formerly reserved for white learners became inclusive institutions accessible to children of all races. Although education reform was probably one of the most pressing challenges facing the democratic process, very little attention was afforded to

[227] I Currie & J de Waal *The New Constitutional and Administrative Law* (2005) 59.
[228] 60.
[229] 61.
[230] 62.
[231] 64.
[232] 1996 (4) SA 744 (CC) ("*Certification case*").
[233] Currie & De Waal *The New Constitutional and Administrative Law* 67.

education during CODESA and the subsequent Multi-party Negotiation Process.[234] This was mainly due to the existence of more pressing political concerns, and it would eventually fall on the new political dispensation to map the way for a democratic education system.[235] Provision was however made in the Interim and the Final Constitution for certain rights pertaining to education and it was realised that dramatic reform was needed to ensure the eradication of the apartheid policy of racially separate education.

Every South African was afforded the right to basic education[236] which included, where reasonably practicable, the right to receive education in the language of their choice. This was a direct response to the arbitrary language policies of the apartheid government and a way of ensuring that all children, regardless of race, colour or language, would be afforded equal educational opportunities. The apartheid government's policy of CNE was also earmarked to transform. The Bill of Rights of both the Interim and the Final Constitution contain provisions relating to freedom of religion. This not only redefined the relationship between the state and religion, but also had a profound impact on the way in which religion had to be dealt with in the education system.

5 2 The Interim Constitution and religion

The Bill of Rights of the Interim Constitution was drafted between May and November 1993 by a Technical Committee appointed by the Multi-Party Negotiation Process.[237] Various international documents and foreign bills of rights were presented to the committee, amongst them, a proposed freedom of religion clause that was submitted by the South African Chapter of the World Conference on Religion and Peace.[238] Section 14(1) of the Interim Constitution was to a large extent a reflection of the first subclause of their proposal, although the committee understood the need to add religious communities' systems of religious law and make provision for legislation to be enacted that would allow for the recognition of these systems.[239]

Substantially, the wording of section 15 of the Final Constitution is almost identical to that of the Interim Constitution, with the exception that the reference to "academic freedom" in section 14(1) now forms part of the right to freedom of expression in the Final Constitution, while section 15(3) of the Final Constitution also recognises marriages concluded under

[234] 405.
[235] 405.
[236] Section 29 of the Constitution.
[237] Farlam "Freedom of religion, opinion and belief" in Woolman *CLOSA* 41-8.
[238] 41-9.
[239] 41-9.

systems of personal or family law.[240] It is also evident that from the outset, there was never an intention to erect a wall of separation between the state and the church in democratic South Africa. In the Interim Constitution provision was already made for the right to conduct religious observances in state and state-aided institutions, and this formulation was carried through to section 15(2) of the Final Constitution.

5 3 Freedom of religion under the Final Constitution and the state-religion relationship

The Final Constitution, like its predecessor, is silent on the relationship that should exist between the state and religion in a democratic South Africa. There is no establishment clause creating a strict separation between the two domains,[241] and the consensus amongst courts[242] and academics is that it was never the intention of the constitutional drafters to prohibit interaction between the state and religion. On closer inspection of the sections dealing with religion, it is quite clear that the Constitution created a framework for accommodating rather than suppressing religion and religious differences. Section 15(1) of the Constitution guarantees that "[E]veryone has the right to freedom of conscience, religion, thought, belief and opinion."

Section 15(2) in turn allows for religious observances to be conducted at state or state-aided institutions, subject to three restrictions: they must "follow rules made by the appropriate public authorities", they must "be conducted on an equitable basis", and attendance must be "free and voluntary". Section 15(3) also allows for legislative recognition of marriages conducted in terms of religious law. Direct or indirect discrimination based on religious grounds is prohibited in section 9 of the Constitution, and everyone is guaranteed equal protection and treatment under the law. Section 31 extends even further, affording members of religious communities the right to practise their religion and form, join and maintain religious organs of civil society. Underlying the right to religious freedom are the interrelated values of freedom, equality and human dignity, which play an equally important role in establishing the parameters of the state-religion relationship in South Africa.[243]

The inclusion of a provision on religious observances at state and state-aided institutions created a framework for the continued presence of religion in education. This is an interesting

[240] 41-5.
[241] LM du Plessis "Freedom of or freedom from religion? An overview of issues pertinent to the constitutional protection of religious rights and freedoms in the new South Africa" (2001) *Brigham Young University Law Review* 439 450.
[242] See *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) ("*Fourie*") para 90; *Lawrence* paras 99-102, 116, 118-9.
[243] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 162.

addition as it initially seemed as if the framers of the Constitution wanted to abolish religion from the education system completely. From 1990 onwards there was much discussion about how the democratic education system might deal with the question of religion in education.[244] Supporters of CNE wanted Christianity to be the only religion taught in schools, while others wanted religion to be completely removed from the education system.[245] In 1992, the National Education Policy Investigation (NEPI) that was commissioned by the National Education Crisis Committee (NECC)[246] insisted that Christian religious instruction in accordance with CNE had to be abandoned.[247] NEPI had three options: to eliminate any form of religious instruction in the school curriculum; to allow different religious groups to develop parallel programmes in religious instruction; or to introduce a programme of multi-religious education which would promote teaching and learning about religion as opposed to the teaching of religion.[248]

From the draft National Curriculum Framework for General and Future Education and Training that was issued by the Department of Education in 1996, it seemed that the new democratic government had opted for the first choice, namely omitting religion altogether. This was mostly based on the presumption that a secular education system made no allowance for religion,[249] and in light of the relationship between education and religion in the past, caution in this regard was understandable. However, the framers of the Constitution created a very interesting paradox. Not only does the Constitution recognise the right to religious freedom, but it also allows for religious observances to be conducted in state and state-aided institutions.[250]

With the promulgation of the Schools Act in 1996, section 15(2) of the Constitution was reflected almost *verbatim* in section 7 of the Act, leaving the right to decide the religious policy of a school in the hands of the governing body. Discrepancies thus exist between initial policy decisions made in the run-up to the adoption of the final Constitution, and the legislative and constitutional framework that governs religion in education today. Although it is clear that religious instruction comparable to CNE will sit extremely uncomfortably alongside the right to religious freedom in the Constitution, the nature and extent of the

---

[244] Jarvis *The voice of the teacher in the context of religious freedom* 4.
[245] 4.
[246] The NECC was formed in the 1980s in order to investigate the growing discontent in education and it continued to assist the government in the process of developing a democratic education system.
[247] Jarvis *The voice of the teacher in the context of religious freedom* 4.
[248] 4.
[249] 4.
[250] Section 14(2) of the Interim Constitution also allowed for religious observances in state and state-aided institutions. Section 14(2) was incorporated as section 15(2) in the Final Constitution.

interchange between religion and education in a democratic South Africa is not altogether clear and will be fleshed out more in coming chapters. As a point of departure, this relationship should, however, reflect the overarching accommodation model of state-religion interaction that is envisioned by the Constitution.

In order to determine how this relationship has developed since the promulgation of the Constitution, reference can be made to the Constitution itself, judicial interpretation of the Constitution and legislation dealing with religious freedom. It is firstly important to note that section 7(2) of the Bill of Rights obliges the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." This is not only a negative duty in the sense that the state must refrain from infringing on the rights of its citizens, but it also has a positive dimension in that the state must actively promote and fulfil the rights in the Bill of Rights.[251] How this obligation should function in the context of religious rights is not completely clear, but it does imply a certain degree of interaction between the state and religion, which means that the state must respect and accommodate the full ambit of religious diversity in the country. Case law relating to section 15(1) also provides insight to the judiciary's interpretation of the appropriate model of state-religion interaction. Chaskalson P (Langa DP, Ackermann J, and Kriegler J concurring) in *Lawrence*[252] explains section 15(1) of the Constitution as follows:

> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person choose, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

The "right to declare religious beliefs openly" and the "right to manifest religious beliefs by worship and practice or by teaching and dissemination" clearly suggest an intention that religion should not be reserved for the private sphere, but can and must become part of the public domain. The presence of religion in the public sphere was also recognised by Sachs J in *Fourie,* a judgment which resulted in the legalisation of same-sex marriages. He stated that:

> "religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes… They are part of the fabric of public life, and constitute active elements of the diverse and pluralist nation contemplated by the Constitution. Religion is not just a question of belief or

[251] *Rail Commuters Community Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 69.
[252] Para 92.

> doctrine. It is part of a people's temper and culture and for many believers a significant part of their way of life."[253]

From these two examples it is clear that the Constitutional Court has interpreted the right to religious freedom to extend to the public domain, rejecting the idea that there should be no interaction between the state and religion. As has already been mentioned, section 15(2) of the Constitution provides specifically for the conduct of religious observances in state and state-aided institutions. In terms of this section, individuals are allowed to express their religious identities positively within the public sphere, but such observances will only be accommodated if they are practised in a way that adheres to the internal restrictions imposed by the Constitution. This section rules out both a strict separation model and a theocratic state in which other religions are subordinate to the state religion.[254] Section 15(3) also makes provision for the recognition of systems of religious, personal and family law, suggesting that the private convictions of people living in accordance with a particular religion can be incorporated into the public sphere by way of legal recognition.

Du Plessis[255] and Bilchitz and Williams[256] argue that the Constitution envisioned an accommodation model where the state and religious communities work together to ensure that everyone is afforded the right to practise their religion without infringing on the rights of others. The values of equality, human dignity and freedom support this understanding. This means that the state must treat all religions equally. The favouring of one religious word-view over another[257] is prohibited as it results in indirect coercion towards the favoured religion[258] and a nation that is divided into "insiders who belong, and outsiders who are tolerated."[259] Similarly, the value of human dignity must inform the right to religious freedom.

Bilchitz and Williams[260] argue, with reference to the Constitutional Court's judgment in *Dawood v Minister of Home Affairs*[261] and the connection the case draws between dignity and family life, that religion is a central aspect of life and has a personal significance for individuals. This was unequivocally accepted by Sachs J in *Christian Education*[262] when he stated that for many believers, their religious convictions are central to all their activities,

---

[253] Para 90.
[254] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 163.
[255] "Freedom of or freedom from religion" *Brigham Young University Law Review* 450.
[256] "Religion and the public sphere" *SAJHR* 164.
[257] 164.
[258] *Lawrence* para 123.
[259] Para 179.
[260] "Religion and the public sphere" *SAJHR* 167.
[261] 2000 (3) SA 936 ("*Dawood*") para 30-6.
[262] Para 36.

awakening "concepts of self-worth and human dignity which form the cornerstone of human rights." Accepting the religious identity of others is consequently a way of respecting and affirming their human dignity. It means that diversity is not simply tolerated, but is celebrated as part of a democratic society.[263]

Bilchitz & Williams[264] provide perhaps the best interpretation of the model of state-religion interaction that must exist under the final Constitution. Criticising the term "accommodation" for implying a purely passive tolerance of religious freedom, they suggest a model of "positive recognition" which is rooted in equality, human dignity and freedom. In my opinion, the term "accommodation" is broad enough to encapsulate the elements of the "positive recognition model." They however identify key elements of the model that can aid in interpreting section 15(2) and the question of the constitutionality of religious observances in public schools. Firstly, the model is rooted in the idea of the equal worth of individuals, regardless of their differences.[265] Secondly, individuals must be protected from coercion by the state that could possibly violate beliefs that are of significant importance to them.[266]

Thirdly, the model places an obligation on the state to create enabling conditions for the positive expression of identity.[267] The state is not necessarily required to construct religious structures for religious communities, but must create an environment in which people can do so for themselves.[268] Fourthly, the state should not impose a separation between itself and religion, but must allow for religion to enter the public domain as long as it is done on an equitable basis and the rights of all religious followers are respected.[269] Fifthly, the model requires the state to adopt an even-handed approach between religions.[270] Sixthly, equal positive recognition must be afforded to all identities, and accommodation, advantages and exemptions may be conferred on some groups as long as it is fair and not to the disadvantage of others.[271] Finally, neutrality in terms of this model is understood as equal recognition of all religions by the state and not a complete withdrawal of religion from the public sphere.[272]

---

[263] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 169; also see Du Plessis "Affirmation and celebration of the 'religious Other'" *African Human Rights Law Journal* 376-408.
[264] "Religion and the public sphere" *SAJHR* 170.
[265] 170.
[266] 170.
[267] 170.
[268] 170.
[269] 170.
[270] 170.
[271] 170.
[272] 170.

## 6 Conclusion

The model of state-religion interaction that is envisioned by the Constitution aims to balance the rights to religious freedom, equality and human dignity in a way that is a far cry from the relationship that existed between the state and religion during South Africa's colonial- and apartheid past. The history of religion and education in South Africa is marked by suppression, overt coercion and racial segregation. Unlike CNE, the accommodation model recognises the importance of religion to individuals and communities and attempts to foster acceptance and celebration of religious differences. Section 15 of the Constitution creates a framework for state-religion interaction that ensures that all people are treated with dignity and respect, irrespective of the religious convictions they hold. It is against this framework that religious observances in public schools must be analysed and understood.

The Constitution does not prohibit religion in public schools, but does regulate the way in which it may be observed. This ensures that religion cannot be used to further the political goals of the ruling elite, but rather requires equity and voluntariness in the conduct of religious observances. The exact meaning of these requirements will be discussed in later chapters,[273] but it is important to note that the meaning afforded to them, must always be reflective of the accommodation model of state-religion interaction. It is also submitted that any interpretation of religious freedom in the context of education, must be informed by the history of racial discrimination, social exclusion and political disempowerment[274] that characterised religion and education during the colonial- and apartheid eras. The aim should always be to steer away from an interpretation that would create a similarly racist, unequal and inhumane dispensation.

[273] Chapters 5 and 6.
[274] *Lawrence* para 152.

# CHAPTER 3

# LEGISLATIVE AND POLICY FRAMEWORK

## 1 Introduction

Religious observances in South African public schools are regulated within a very particular constitutional-, legislative- and policy framework. As has already been mentioned, the Constitution stands at the centre of the inquiry into religious observances as it provides for freedom of religion[1] and the performance of religious observances in state- and state-aided institutions.[2] Much of the inquiry into the constitutionality of religious observances in public schools will be determined by the way in which section 15(1), and especially section 15(2), is interpreted. These provisions should, however, not be viewed in isolation as they are supported and enhanced by inter-related provisions in the Bill of Rights. These include the right to equality, human dignity, freedom of expression, freedom of assembly, freedom of association, the right to form part of a religious community, the best interest of the child and the general limitation clause.

Apart from the Constitution, the Schools Act makes specific provision for school governing bodies to make rules relating to religious observances. A further important instrument is the National Policy on Religion and Education which was published in 2003 with the express purpose of regulating the manner in which religious observances are conducted at public schools. Furthermore, there are a number of international law instruments that relate to the right to religious freedom and religious observances. South African courts are obliged to consider these instruments when interpreting the Bill of Rights[3] and the interpretation of these documents may aid the courts in establishing the parameters of religious observances in South African schools.

This chapter will provide an overview of the constitutional, legislative and policy framework that regulates religious observances. Firstly, the constitutional provisions relating to religious observances will be analysed and the nature and scope of the right to religious freedom, as well as all the relevant supporting rights, will be considered. The aim is to establish the role of the supporting rights in religious observances and the manner in which these rights overlap with section 15 of the Constitution. Thirdly, the Schools Act will be discussed, after which the focus will fall on the National Policy on Religion and Education and its impact on religious observances in schools. Relevant international law documents will

[1] Section 15(1) of the Constitution.
[2] Section 15(2) of the Constitution.
[3] Section 39(1) of the Constitution.

also be analysed to determine the role of these instruments in interpreting the right to conduct religious observances. Although section 15(2) will form the primary focus of this study, it does not exist in isolation and must be informed and influenced by the larger legal context in which it is situated. The aim of this chapter is to determine all the rights, legislation and policies that interplay when religious observances are conducted within a school setting.

## 2 The Constitutional Framework

The Constitution is regarded as a symbolic bridge between the past of a deeply divided society and a future founded on the recognition of human rights and reconciliation between all South Africans.[4] It is also meant to transform the legal system from a system based on parliamentary sovereignty to one governed by constitutional supremacy. Section 2 of the Constitution states that "[t]he Constitution is the supreme law of the Republic [and] law or conduct inconsistent with it is invalid". When considering the legal and policy framework governing religious observances in South Africa, it is thus imperative to consider the Constitution first.

### 2 1 The right to religious freedom

As has already been mentioned, section 15 of the Constitution governs religious freedom in South Africa and states inter alia:

> "(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
> (2) Religious observances may be conducted at state or state-aided institutions, provided that
> a) those observances follow rules made by the appropriate public authorities;
> b) they are conducted on an equitable basis; and
> c) attendance at them is free and voluntary
> (3)(a) This section does not prevent legislation –
> i) marriages concluded under any traditional, or a system of religions, personal or family law; or
> ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
> (b) Recognition in terms of paragraph (a) must be consistent with this section and other provisions of the Constitution."

[4] E Mureinik "A bridge to where? Introduction to the interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31; Janse van Vuuren *Religious Education in Secondary Schools* 32 32.

Section 15(1) has a rather broad scope, protecting not only religion, but also the freedom of conscience, belief and opinion. Currie and De Waal[5] argue that the inclusion of these rights makes a debate about the meaning of "religion" unnecessary as nothing in the realm of liberty of conviction is left unprotected.[6] "Conscience" is usually interpreted to include systems of belief, or a set of personal moral beliefs, that are not centred on a deity and not classified as religious.[7] Agnosticism and atheism, for example, will be protected under "belief" and "conscience".[8] The presence of a right to freedom of "opinion" in a clause centred on the protection of convictions is without precedent in international and foreign jurisprudence.[9] Farlam,[10] however, argues that a set of deeply held opinions can form a comprehensive view of the good life that is comparable to conventional religious faiths. "Thought" refers to the application of human reason and, together with opinion, conscience and belief, introduces a notably secular element into section 15(1).[11]

Du Plessis[12] observes that the inclusion of freedom of "conscience," "thought" and "belief" amplifies the protection of religious freedom by extending the right to related spheres of protection. This rather extended formulation of religious freedom and the inclusion of secular rights denotes both a positive and a negative element to religious freedom. The bearers of the right may choose to adhere to a religion or denomination – the positive right – or not to believe in any religion – the negative right.[13] The right to religious freedom may be manifested individually, collectively or institutionally.[14] The individual may practise and observe his religion completely on his own or as part of a religious community where the right is exercised collectively with other believers.[15] Furthermore, religious freedom includes the right to establish religious associations like a church or a missionary organisation, affording the right an institutional dimension.[16]

---

[5] *Bill of Rights Handbook* 316.
[6] N Smith "Freedom of Religion" in Woolman S, Roux T & Bishop M (reds) *Constitutional law of South Africa: Revision Service 2* (1998) 19-6.
[7] P Hogg *Constitutional Law of Canada* 3rd ed (1992) 947.
[8] *Wittmann* 60.
[9] Farlam "Freedom of religion, belief and opinion" in Woolman *CLOSA* 41-14.
[10] 41-14.
[11] 41-13.
[12] "Religion, law and the state in South Africa" *European Journal for State and Church Research* 221.
[13] See Van der Schyff *The right to freedom of religion in South Africa* 71.
[14] 72.
[15] 73.
[16] 74.

Religious freedom also consists of an internal and an external element.[17] The internal element is centred on the individual's "spiritual integrity" which is found in the conscience of the individual,[18] and section 15 protects this internal belief system. However, religious beliefs also manifest externally in the form of religious convictions, practices and observances.[19] These expressions of the internal beliefs of the individual are also protected under section 15(1), and even more so under section 15(2) of the Constitution. This coincides with the interpretation the Constitutional Court has attached to religious freedom when Chaskalson P in *Lawrence* explained the essence of the right as:

> "[…] the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination."[20]

Freedom of religion thus includes the right to have a belief, to express that belief publicly and to manifest such belief by worship and practice, teaching and dissemination.[21] It also prohibits coercion or constraint that might force people to act or refrain from acting in a manner contrary to their religious beliefs.[22] Van der Schyff[23] analyses the right even further, arguing that religious freedom is composed of five distinct, yet related, freedoms. These are the freedom of religious autonomy**,** choice, observance, teaching and the right to propagate a religion.[24] The right to religious autonomy includes the right to state non-identification which prohibits the state from aligning itself with a particular religion. Autonomy further implies the right of individuals to regulate their own affairs,[25] which means that the bearers of the right may establish, constitute and maintain their own religious bodies and organisations.[26] They are also allowed to regulate their own doctrine[27] and set guidelines for the admission of members to their religious organisations.[28]

---

[17] 75.
[18] BC Labuschagne "Religious freedom and newly-established religions in Dutch law" (1997) *Nederlands International Law Review* 168 174.
[19] 174.
[20] *R v Big M Drug Mart* [1985] 1 SCR 295 336 ("*Big M Drug Mart*") in *Lawrence* para 92.
[21] *Prince* para 38; *Christian Education* para 19; Currie & De Waal *Bill of Rights Handbook* 316.
[22] *Lawrence* par 92; *Christian Education* para 19; *Prince* para 38.
[23] *The right to freedom of religion in South Africa* 79.
[24] 79.
[25] G van der Schyff "Freedom of religious autonomy as an element of the right to freedom of religion" (2003) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 512 521.
[26] 522.
[27] 523.
[28] 525.

Secondly, the freedom of religious choice protects the right of an individual to adhere to a particular religion,[29] as well as the right to religious non-adherence and religious objection.[30] Thirdly, the right to religious freedom includes the right to freedom of religious observance.[31] This component protects the acts motivated by and associated with religion like the right to worship and observe religious rites.[32] Furthermore, the right to observe religious days of rest and holy days is also part of the right to religious freedom as the celebration of these religious days often constitutes a central component of individuals' ability to practise their religion.[33] Although the right to religious observance is a component of religious freedom, it is also afforded special protection in section 15(2) of the Constitution.

As has already been mentioned, section 15(2) limits religious observances in state and state-aided institutions to observances that are free and voluntary and conducted on an equitable basis.[34] It is however important to note that although the right to religious observances is part of the right to religious freedom, it is limited when practised in state and state-aided institutions. The fourth freedom is the freedom of religious training and upbringing.[35] This encapsulates the training and teaching of individuals by religious organisations such as churches, as well as the rights of parents to ensure and design the upbringing of their children in conformity with their religious convictions.[36] Parents are thus allowed to create a home environment that is conducive to religion and may even enrol their children at religiously minded schools or choose to have their children exempt from religious activities that are incompatible with their religious views.[37] Arguably, this right also includes the right of parents and children to refrain from religious training and upbringing altogether. Parents thus have the right to refrain from instructing their children in religion, and to give them a secular education and upbringing.

One of the arguments in support of religious observances in public schools is that these observances are a manifestation of parents' and learners' right to a religious upbringing. On a broad interpretation of section 15(1) it would be possible to argue that public schools can aid religious parents in ensuring that their children receive a religious upbringing. This may for example be done through the honouring of religious holy days or the conducting of religious

[29] Van der Schyff *The right to freedom of religion in South Africa* 118.
[30] 119.
[31] 132.
[32] 133.
[33] 138.
[34] The ambit of these requirements will be discussed in Chapter 5 and 6.
[35] Van der Schyff *The right to freedom of religion in South Africa* 147.
[36] 148.
[37] 148.

observances. Within the public school setting, any religious observances must however be conducted in accordance with section 7 of the Schools Act, read with section 15(2) of the Constitution. Consequently, the wish of parents to have their children exposed to religion as part of their formal education, may not override the specific provisions of voluntariness and equity. It may also not infringe on the rights of non-adhering parents to exempt their children from a religious education. In this instance the right to religious freedom is a double edged sword that can both advance the religious activities of religious adherents and similarly protect the rights of non-adhering parents and learners.

Lastly, religious freedom also protects the freedom to propagate a religion or denomination with the aim to convert people to that religion.[38] The propagation of religion is considered an important part of many religions and is aimed at attracting people to a particular faith in the hope that they will convert to that religion. Consequently, bearers of the right to religious freedom are entitled to spread information about their religion and express and display their religious convictions publically. The right to spread information about religion is also extended to non-believers. The right to religious freedom thus allows religious non-adherents to promote their secular views of the world and criticise the nature and content of religions. This component of religious freedom is very closely related to freedom of expression which will be discussed below.[39]

Learners, parents and teachers often cite the right to propagate a religion as entitling them to conduct religious observances in public schools. It is argued that the proselytising of non-believers forms an important part of many religions and may be achieved by conducting religious observances that will expose non-believers to religious practices and inform them of the nature and the content of a particular religion. This argument may, however, not be used to circumvent the specific provisions of section 7 of the Schools Act, read with section 15(2) of the Constitution. The right to propagate a religion as an element of religious freedom does not imply that religious observances may be conducted in state or state-aided institutions in contravention of the requirements of free and voluntary and equitable basis in 7 and section 15(2). Section 15(1) and section 15(2) must be read in harmony and not as conflicting provisions. The right to propagate a religion by way of religious observances is thus limited by section 15(2) of the Constitution and section 7 of the Schools Act.

*Lawrence* was the first case on the right to religious freedom to be heard by the Constitutional Court and dealt with certain provisions of the Liquor Act 27 of 1989 that

[38] 154.
[39] See 2 4 of Chapter 2.

prohibited the sale of alcohol on Sundays. In terms of the Liquor Act,[40] Sundays, Good Friday and Christmas Day were regarded as "closed days". The wine licence of a grocer did not permit the sale of alcohol on these days. The closed days identified in the Liquor Act coincided with the Christian holy days and in this case a holder of a grocer's licence argued that these provisions contravened the right to economic activity in section 26 of the Interim Constitution and the right to religious freedom in section 14(1) of the Interim Constitution.[41] As has already been mentioned in Chapter 2, a majority of the judges in *Lawrence* found that section 14 did not include an establishment clause and that the South African Constitution did not envision an absolute separation between the state and religion.

Chaskalson P held that the definition of "closed days" in the Liquor Act did not constitute an infringement of the right to religious freedom. He stated that while he had no difficulty in finding that a law compelling observance of the Christian Sabbath offends the religious freedom of non-Christians,[42] the Liquor Act was not such a law. He found that Sundays have both a religious and a secular character in South Africa.[43] The purpose of the provision was to reduce the consumption of alcohol on certain days and Sunday was a logical choice as it has become a universal day of rest. There was no evidence that the Liquor Act interfered with the freedom of religion or served any religious purpose.[44] Furthermore, the provisions did not compel sabbatical observances and did not promote any particular religion.[45] Grocers were still allowed to conduct any other business on Sundays and no-one was forced to act or to refrain from acting in a manner contrary to their religious beliefs.[46]

O'Regan J (Goldstone J and Madala J concurring) in her separate judgement found that the definition of "closed days" clearly favoured Christianity over all other religions.[47] According to her, a law infringes the right to freedom of religion if it does not treat all religions fairly and in an even-handed manner.[48] She found that the choice of closed days was premised on their significance to the Christian faith and that the purpose of the selection was not secular, resulting in the state endorsement of Christianity.[49] Having found that the Liquor Act did infringe the right to religious freedom, O'Regan J proceeded to determine whether

[40] Sections 2, 90(1)(a) and 163(1)(a).
[41] *Lawrence* para 7.
[42] Para 89.
[43] Para 95.
[44] Para 97.
[45] Para 90.
[46] Para 94.
[47] Para 125.
[48] Para 128.
[49] Para 127.

this was a legitimate limitation of the right in terms of section 33 of the Interim Constitution. She accepted that one of the purposes of the Liquor Act was to restrict the consumption of alcohol on closed days, but found that this could not have been the primary purpose since alcohol could still be sold in restaurants and hotels. She consequently found that the provisions of the Liquor Act unjustifiably limited section 14 of the Constitution.[50]

Sachs J (Mokgoro J concurring) in his separate and dissenting judgment held that the objective of section 14 is to "keep the state away from favouring or disfavouring any particular world-view" and that there was an obligation on legislators and legislative drafters to be neutral.[51] He argued that the prohibition on the sale of liquor by grocery stores on Sundays amounted to an endorsement of one religion, namely Christianity, over others in as far as it sends a symbolic message that is "inclusionary for some and exclusionary for others."[52] This constituted an infringement of section 14, but Sachs J found this infringement justifiable in terms of section 33 of the Interim Constitution. Weighing the symbolic effect of choosing Christian closed days against the evils of alcohol abuse, he held that the endorsement of Christianity in this case was relatively mild in comparison to the importance of curtailing alcohol consumption.[53] Consequently, the Liquor Act constituted a justifiable infringement of the right to religious freedom.

The judgment in *Lawrence* established some important principles with respect to religious freedom that will be discussed in the course of this study. As for now, it is sufficient to note that the case laid the foundation for understanding the interaction between the state and religion under the Constitution and the nature and scope of the right to religious freedom. *Christian Education* was the second notable constitutional decision dealing with the right to religious freedom. The case concerned a challenge to section 10 of the South African Schools Act which prohibits corporal punishment in schools. The parents of children in a Christian private school averred that the prohibition infringed on their religious and cultural rights in so far as they regarded corporal punishment and its application in the school environment as part of their religious duty to discipline their children. The court assumed that the prohibition limited the religious rights of the parents, but found that this infringement was justifiable under the general limitation clause in section 36.

The Constitutional Court held that corporal punishment in schools violated learners' human dignity and the protection against cruel, inhuman and degrading treatment and

[50] Para 132.
[51] Para 160.
[52] Para 137.
[53] Para 177.

punishment in section 12 of the Constitution. According to the court the whole symbolic, moral and pedagogical purpose of the ban on corporal punishment would be undermined if exemption was allowed for certain learners in certain schools.[54] Furthermore, it would be difficult to monitor and control the administration of corporal punishment resulting in learners being vulnerable to abuse. This case clearly illustrates the fact that, although parents, teachers and learners are the bearers of religious freedom, this right is not absolute and may in some instances have to submit to other important rights and considerations.

As will be illustrated below, the right to religious freedom is not an isolated right, but is related to numerous other rights and freedoms that could enhance or inhibit an individual or a groups' religious freedom. As the court noted in *Christian Education*, the religious community that wanted corporal punishment in schools could not use the right to religious freedom to shield them from an attack on their constitutionally offensive group practices.[55] In this context, the right to human dignity and the protection against cruel and inhuman punishment outweighed the religious freedom of the parents.

Furthermore, there is an obligation on the state to prohibit practices that cause physical and emotional harm to individuals[56] and especially children that are vulnerable to abuse. This is illustrated by another landmark decision dealing with religious freedom. In *Prince*, the Constitutional Court had to decide whether a decision by the Cape Law Society not to register the applicant's contract of articles in terms of the Attorney's Act 53 of 1979 was an infringement of the right to religious freedom. The applicant was a Rastafarian who had previously been convicted for the possession of dagga and the Law Society argued that he did not qualify as a "fit and proper person" as is required for the registration of a contract of articles. The applicant averred that the use of dagga was constitutionally protected as an exercise of his religious freedom.

The court found that the general statutory prohibition on the possession of dagga restricted the right to religious freedom as the use of dagga was central to the practice of the Rastafarian religion. The prohibition thus limited the ability of Rastafarians to manifest their religion through worship and practice, teaching and dissemination.[57] However, the court, on a narrow margin, found that this limitation was justifiable in terms of section 36 as it would be unfeasible to allow an exemption for Rastafarians without undermining the general

[54] *Christian Education* para 51; Currie & De Waal *Bill of Rights Handbook* 322.
[55] *Christian Education* para 29.
[56] *Prince* para 108.
[57] Para 38.

prohibition.[58] The court also felt that it would be practically difficult to police the use of dagga if exceptions are made on religious grounds.[59] Consequently, the prohibition was found to be constitutional as it justifiably limited the appellant's religious freedom.

Just as *Christian Education*, the *Prince* judgment illustrates that the right to religious freedom is not unlimited and may be restricted by other rights and interests. This is an important consideration when interpreting the right to religious observances in public schools. Religious observances associated with a particular faith, may have a damaging effect on the rights of learners, teachers and parents who do not conform to the prevailing religion. The religious freedom of the majority must thus be weighed against the minority's right to be free from religious coercion. This balancing act will inevitably mean that the nature and the content of religious observances in public schools must be adjusted to ensure the least strenuous infringement on the rights of religious minorities. The Constitutional Court judgment in *MEC for Education, Kwazulu-Natal v Pillay*[60] provides some guidance on achieving this balance. Although the case did not deal specifically with religious observances in terms of section 7 of the Schools Act or section 15(2) of the Constitution, it did establish general principles that may guide the interpretation of religious observances in the school setting.

The *Pillay* case dealt with the prohibition on the wearing of a nose-stud in a schools uniform code. The appellant was a member of the Hindu faith and regarded the wearing of a nose stud as a central tenet of her religion and culture. The court held that, in weighing the relative importance of the religious practice of wearing a nose-stud against the hardship that it caused the school, an exemption should be allowed on grounds of religious freedom and culture.[61] Furthermore, the court applied the principle of "reasonable accommodation" as a means to settle the dispute.[62] Reasonable accommodation is the notion that the state, community or a school must sometimes "take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally."[63] This prevents people from being relegated to the margins of society because they do not, or cannot conform to certain social norms.[64] The principle of reasonable accommodation may be a helpful mechanism in the structuring of religious observances in

[58] Para 133.
[59] Para 133.
[60] 2008 (1) SA 474 (CC) ("*Pillay*").
[61] Para 114.
[62] Currie & De Waal *The Bill of Rights Handbook* 325.
[63] *Pillay* para 73.
[64] Para 73.

public schools and will be elaborated on later in the study.[65] For now, it is only important to note that reasonable accommodation may aid the state and public schools in conducting religious observances in line with section 7 of the Schools Act and section 15(2) of the Constitution, as it has the potential to inform the equitability requirement.

Du Plessis[66] argues that section 15 invites an interpretation that links it to related rights in the Bill of Rights in order to maximise its protection. Religious freedom must thus be viewed contextually in order to understand the generous protection it affords.[67] These contextual or supporting rights include the rights to equality, human dignity, freedom of expression, freedom of assembly and petition, freedom of association, the right to be part of a religious community, and, with reference to children, the best interest of the child. Supporting rights are usually relevant in one of two ways. Firstly, any interpretation of section 15 must be done in view of the supporting rights as these rights intersect with religious freedom and reinforce and inform its interpretation on a variety of levels.[68]

Secondly, a constitutional challenge founded on section 15 may very well be based on some of the supporting rights as well. It is easy to conceive a scenario where one party relies on the right to religious freedom while the other party argues that the right to freedom of expression affords him the right to criticize others' religious convictions. In these cases, the supporting rights could overlap, reinforce each other, or conflict. This will call for a delicate balancing of supporting and conflicting rights where the weight attached to each is determined by the facts of the case and the nature of the rights in question. It is however important to note that all the supporting rights must be interpreted in the context of section 15(2). The rights must thus be aligned to the particular provisions on religious observances and must be interpreted to shed light on the restrictions in section 7 of the Schools Act and section 15(2) of the Constitution.

### 2 2 The right to equality

Section 9(1) of the Constitution guarantees the right of everyone to equal protection and benefit of the law.[69] Subsections (3) and (4) prohibit both the state[70] and any person[71] from

[65] See Chapter 6 at 5 3.
[66] Du Plessis "Religion, law and the state in South Africa" *European Journal for State and Church Research* 230.
[67] Van der Schyff *The right to freedom of religion in South Africa* 78.
[68] *Dawood* para 35.
[69] Section 9(1).
[70] Section 9(3).
[71] Section 9(4).

unfairly discriminating directly or indirectly against anyone on various grounds, including religion, conscience and belief. Du Plessis[72] contends that the protection of religious rights and freedoms under the equality clause is as significant and indispensable as their protection under section 15(1). It ensures the equal treatment of all people, regardless of the religious convictions they hold and protects people, communities and organisations form unfair discrimination based on religion. It also protects conduct associated with religious beliefs, which includes religious observances and practices.[73] Albertyn[74] suggests that this would include protection against prohibitions on forms of dress associated with a particular religion, for example a headscarf worn by Muslim schoolgirls. Furthermore, section 9 implies the even-handed treatment of religions.[75]

Religion cases have, however, not often come before court under the constitutional guarantee of religious equality[76] and most cases have been considered under section 15(1).[77] Consequently, most of the claims have been based on the substantive right of freedom rather than unfair discrimination.[78] In instances where religious equality and unfair discrimination have played a role, the cases have related to questions of religious diversity, tolerance and freedom.[79] In *Christian Education* the Constitutional Court addressed the issue of religion and equality. The Minister of Education argued that allowing for a special exemption in favour of religious practices would violate the equality provision in section 9 as it would treat some children differently from others based on their religion or the type of school the children attended.[80] In response to this argument, Sachs J explained the relationship between freedom of religion and the right to equality as follows:

> "It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who do not hold those views. As the court said in *Prinsloo v Van der*

[72] "Freedom of or freedom from religion?" *Brigham Young University Law Review* 450.
[69] C Albertyn "Equality" in Cheadle MH, Davis DM & Haysom HRL (eds) *South African Constitutional Law: The Bill of Rights* (2005) 4-41.
[74] 4-41.
[75] Du Plessis "Freedom of or freedom from religion?" *Brigham Young University Law Review* 450.
[76] 450; C Albertyn & B Goldblatt "Equality" in Woolman S, Roux, T & Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (2009) 35-71.
[77] 35-71.
[78] Albertyn "Equality" in Cheadle MH et al *South African Constitutional Law* 4-41.
[79] 4-41.
[80] *Christian Education* para 42.

> *Linde & Another*, the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect. Permission to allow the practice to continue, would in these circumstances, not be inconsistent with the equality provisions of the Bill of Rights."[81]

In the *Lawrence* case, O'Regan J also elaborated on the role of equality in the context of religious freedom. She held that section 15(1) required the state to act fairly and equitably in its interaction with the different religions in South Africa.[82] According to O'Regan, the state must act even-handedly in relation to different religions, which does not necessarily require complete neutrality on the side of the state or "a commitment to scrupulous secularism".[83] Instead, even-handedness will sometimes "require specific provisions to protect the adherents of particular religions."[84] Accordingly, religious freedom entails that there be no inequitable or unfair preference of one religion over others.[85] Sachs J in his dissent also addressed the right to equality in the context of religious freedom. He suggests that the Constitution requires the state to acknowledge different belief systems and to accommodate them within a non-hierarchical framework of equality and non-discrimination.[86] The state is thus not allowed to take sides in matters of religion and may not "impose belief, grant privileges to or impose disadvantages on adherents or any particular belief".[87]

Furthermore, the state may not marginalise people for having different beliefs or expect people to conform in matters of religion.[88] It is important to note that the plaintiffs in the *Lawrence* case did not rely on section 9 of the Constitution, but based their argument on section 14(1)[89] of the Interim Constitution. It thus seems as if the court read religious equality as an element of religious freedom, without employing section 9 as a separate right in this case.[90] Currie and De Waal[91] argue that this step is unnecessary as section 9 could easily have provided the protection that the court has now attributed to section 15(1). Regardless of the method, the right to religious freedom is closely associated with the right to equality and implies that religions must be treated in an even-handed and equal manner. As a supporting

---

[81] Para 42.
[82] *Lawrence* para 121.
[83] Para 122.
[84] Para 122.
[85] Para 123.
[86] Para 146.
[87] Para 147.
[88] Par 146.
[89] Section 15(1) of the Final Constitution.
[90] Currie & De Waal *Bill of Rights Handbook* 329.
[91] 329.

right it enhances the protection provided by section 15(1) and can be a helpful mechanism to eradicate unfair discrimination based on religion, culture and opinion. Furthermore, it reflects the model of state-religion interaction envisioned by the Constitution by ensuring that the state affords equal recognition to all religions and respects the rights of religious followers.[92]

However, within the context of religious observances in public schools, the right to equality has a particular meaning in as much as section 7 of the Schools Act and section 15(2) of the Constitution require religious observances to be conducted on an equitable basis. Apart from the general protection learners, teachers and parents have to religious equality in terms of section 9 and section 15(1), the requirement of "equitable basis" envisions a standard of equality unique to religious observances. Chapter 6 will deal extensively with the interpretation of "equitable basis" and the manner in which it finds application in the public school system. Closely associated with the right to religious freedom and equality, is the right to human dignity.

2 3 The right to human dignity

Section 10 of the Constitution states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." The close link between human dignity and religious freedom is highlighted by Sachs J in *Christian Education*, when he states that for many believers their religious convictions are central to all their activities, awakening "concepts of self-worth and human dignity which form the cornerstone of human rights."[93] It provides "support and nurture, and a framework for individual and social stability and growth," allowing people to relate "in an intensely meaningful way to themselves, their community and their universe."[94] Human dignity manifests most prevalently in relation to the autonomy which underlies religious freedom. It is expressed by the free development of an own identity which is closely related to the freedom to choose to adhere or not to adhere to a particular religion or denomination.[95]

Human dignity may function either as an independent right or as a contextual right.[96] Dignity may thus be independent from religious freedom[97] or act contextually to advance the protection afforded by religious freedom. This is illustrated by the following example. If a school community decides to conduct religious observances in accordance with the Christian

[92] Bilchitz & Williams "Religion in the public sphere" *SAJHR* 170.
[93] *Christian Education* para 36.
[94] Para 36.
[95] Van der Schyff *The right to freedom of religion in South Africa* 109.
[96] 108.
[97] 108.

faith and a Jewish learner is expected to participate as well, his dignity is infringed in two ways. Firstly, this is an infringement of section 10 of the Constitution, as the coercion of a learner to participate in actions contrary to his religious convictions, constitutes a violation of his inherent human dignity. In this case the religious freedom enjoyed by the adherents of the majority religion, directly impacts on the dignity of those learners who do not adhere to the prevailing religion. This is an example where the two rights conflict.

Secondly, the learner enjoys a right to religious dignity. This means that the religious freedom he enjoys is further enhanced by the protection of the dignity of his beliefs and convictions. The close relationship between the right to religious freedom and dignity strengthens his right to refrain from participating in observances that contravene his own religious beliefs. In principle, the right to religious dignity guarantees complete and total respect and dignity to the bearers of the right.[98] Van der Schyff[99] argues that any move to protect religious dignity should be aimed at protecting the dignity of all the bearers of the right and not merely the largest or the most favoured persuasions in the religious community.

This is an important consideration when addressing the constitutionality of religious observances in public schools. As all learners, teachers and parents are bearers of the right to human dignity, religious observances must be devised in such a way so as not to infringe on their dignity. This will entail sensitivity to the differences that exist between religions and a concerted effort to accommodate adherents of minority religions. Correctly applied, the requirements of voluntariness and equity in section 7 of the Schools Act and section 15(2) of the Constitution has the potential to protect the dignity of all learners, regardless of their faith. One way to achieve this is by conducting religious observances on an equitable basis as envisioned by section 15(2) of the Constitution. The interpretations afforded to these requirements must thus be informed and infused with the need to protect the inherent dignity of both religious and non-religious individuals in the school system.

### 2 4 Freedom of expression

The right to freedom of expression in section 16 of the Constitution allows for views and ideas to be spread and communicated.[100] As a supporting right to religious freedom it strengthens the right of people and organisations to freely criticise, support and challenge

[98] 109.
[99] 112.
[100] 155.

social and political structures and policies in terms of the teachings of their religion.[101] Similarly, it affords the right to non-believers to criticise, support and challenge the beliefs of religious followers or religious groups and organisations. It also enhances the right of believers to propagate their religion and to attract converts. In this sense the right to freedom of expression aids the manifestation of religious rights.

The right to freedom of expression is however limited, and expressly excludes expression that constitutes propaganda for war,[102] incitement of imminent violence,[103] or the advocacy of hatred that is based on race, gender or *religion*, and that constitutes incitement to cause harm.[104] The scope and content of these limitations are not exactly clear within the context of religious freedom. The court in *Islamic Unity Convention v Independent Broadcasting Authority*[105] suggests that not all expressions that are likely to prejudice relations between sections of the population would necessarily be viewed as the "advocacy of hatred" based on religion. A certain amount of freedom is thus allowed for expression that criticises or denounces religious beliefs, observances and practices, although the exact extent of this freedom is somewhat uncertain.[106]

A religious message may however also be limited under section 36 to avoid the denigration and belittlement of other religions and to protect the right to religious dignity of others.[107] Van der Schyff[108] points out that the content of a message may be so malicious and crude that it can cause grave offence and hurt to the followers of the targeted religion. In these instances the aim is usually to insult people and religions rather than raising genuine arguments or issues pertaining to faith.[109] These messages may be limited by requiring their modification, or in severe instances, their removal from the public sphere. The method used to propagate a message pertaining to religion, may also be limited when it is reasonable and justifiable to do so in a democratic society. This is particularly important in the context of religious observances in public schools. Although the right to freely express religious messages or even propagate religion cannot be taken away completely, the content of the message and in particular, the method of expression may be limited.

---

[101] Du Plessis "Religion, law and the state in South Africa" *European Journal for State and Church Research* 230.
[102] Section 16(2)(a).
[103] Section 16(2)(b).
[104] Section 16(2)(c).
[105] 2002 (4) SA 294 (CC) ("*Islamic Unity*") para 36.
[106] Du Plessis "Religion, law and the state in South Africa" *European Journal for State and Church Research* 231.
[107] Van der Schyff *The right to freedom of religion in South Africa* 157.
[108] 157.
[109] 157.

As will be argued later in this study, it would be appropriate for learners to have a moment of silence as part of a school assembly to observe a religious prayer or simply use the time for non-religious reflection. What may be limited is the use of microphones to broadcast a prayer to the entire school community as this may have a potentially coercive effect on religious minorities. In the school context the right to religious freedom and non-coercion of minorities may often be in conflict with the right to freedom of expression of the religious majority. In these instances it is important to achieve a proportionate balance, underscored by practical methods, to mitigate the adverse effect of freedom of expression on religious minorities. A limitation of the right to freedom of expression will have to be allowed in order to protect the right to religious freedom. Conversely, the right to religious freedom and freedom from coercion may also have to be limited in some rare instances in order to ensure that freedom of expression is afforded recognition.

2 5 Right to assemble, demonstrate, picket and petition

The right to assembly, demonstration, picketing and petition in section 17 of the Constitution is also relevant to religious freedom. Religious observances and practices are usually conducted at gatherings of religious followers. The right to assembly is thus a supporting right to religious freedom as it allows adherents of a particular faith to practise their religion together with other believers. It enhances the right of religious followers to assemble for sermons in a church or to gather in a place of religious significance. This right would be equally applicable to learners, teachers and parents who want to assemble in the school context to perform religious observances. However, just like the other supporting rights, the right to assemble in order to observe religion, must be subject to the requirements in section 7 of the Schools Act and section 15(2) of the Constitution.

This means that although religious adherents may have the right to assemble and observe their religion, they may not force non-adherents to attend. The assembly must also be structured in such a way that it does not have an overtly coercive effect on non-adhering students, teachers and parents. The nature and content of coercion will be discussed in more detail in Chapter 5, but it would arguably not be appropriate to assemble on the school playground during break time and conduct religious observances in an open area where it would be obvious to identify the students who are not participating. It would be more appropriate to assemble in a space and at a time where it would be less obvious who are not attending and participating in the religious observances. The right to assemble thus needs to

be aligned with the requirements of voluntariness and equity in order to ensure that the religious freedom of non-adhering learners is protected.

2 6 Freedom of association

Linked to the right of assembly, is section 18 of the Constitution that guarantees the right to freedom of association.[110] The right to associate with a particular religion and its followers is instrumental in the practise and protection of religion freedom. When people associate themselves with a religious group, a sense of belonging is fostered. The right to publically acknowledge this association without fear of judgment or retribution is fundamental to religious freedom. Freedom of association naturally also entails the right not to associate with any religion at all and to refrain from membership or association with a religious organisation, practice or observance. It further guarantees religious followers the right to associate and organise according to their own wishes and affords contextual support to the institutional element of religious freedom.[111]

The court in *Wittmann*[112] said that freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join an association to conform with its principles and rules.[113] This judgment was delivered with reference to a private school where the relationship between the school and the learners is vastly different from that of a public school. In private schools learners, parents and teachers contractually bind themselves to the rules and religious practices of the school. In public schools, this contractual relationship does not exist and the school delivers a public service to the learners and parents. The right to freedom of association may be limited in this context. A public school does not have the right to exclude non-conformists or to require everyone in the school to adhere to the rules of a particular religious "association." Even though nothing can stop learners, parents and teachers from associating with people that share their religious views, forced association may not be implemented at an institutional top-down level.

When learners conduct religious observances together with other learners and teachers, they are exercising their right to freedom of association. This right is however subject to section 7 of the Schools Act and section 15(2) of the Constitution and must be exercised in a manner that does not place a coercive burden on those who do not associate with the prevailing religion. The right is consequently limited by the context in which it is exercised.

[110] The Constitution.
[111] Van der Schyff *The right to freedom of religion in South Africa* 73.
[112] 65
[113] 65.

A public school is not a religious association and although the learners, teachers and parents each have the right to associate with the religions of their choice, the school may not force learners, parents and teachers to associate with a particular religion. Freedom of association may enhance the right to religious freedom, but just as most of the supporting rights, it may also be limited in order to protect the rights of religious minorities in the school system.

2 7 Right to a religious community

Section 31(1) of the Constitution recognises the right of persons "belonging to a cultural, religious or linguistic community" […] "with other members of that community", to:

> "(a) enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

It is clear that section 31(1)(b) provides a measure of protection for the communal and institutional manifestations of religious rights,[114] but the language of section 31 is not as forceful as that of section 15. The right is formulated negatively and simply states that these rights "may not be denied," but places no positive obligation on the state or any other party to actively promote and protect the rights of religious communities. There was no equivalent to section 31 in the Interim Constitution[115] and until the decision in *Prince* the nature of the relationship between section 15(1) and section 31 was uncertain. In *Prince,* Ngcobo J suggests that section 15(1) and section 31 complement each other.[116] Section 31(1)(a) "emphasises and protects the associational nature of cultural, religious and language rights,"[117] and "in the context of religion, it emphasises the protection to be given to members of communities united by religion to practise their religion."[118]

Van der Schyff[119] also suggests that the right to form religious communities and join religious organisations is a manifestation of the autonomy which is a necessary element of the right to religious freedom. It implies that religious communities and organisations are

[114] Du Plessis "Religion, law and the state in South Africa" *European Journal for State and Church Research* 232.
[115] Farlam "Freedom of religion, belief and opinion" in Woolman *CLOSA* 41-3.
[116] *Prince* para 39.
[117] Para 39.
[118] Para 39.
[119] *The right to freedom of religion in South Africa* 80.

allowed to regulate their own internal affairs and practise religion in accordance with their own convictions. The nature of section 31 within the public school system is unclear. It is submitted that, although all learners, parents and teachers are bearers of this right, it is somewhat limited in the school context. As has already been mentioned, there is no positive obligation on the state to actively promote and protect the rights of religious communities.

Although learners, teachers and parents may not be barred from forming a religious community or organisation, the extent to which they are allowed to conduct religious observances and practices in public schools as part of this community or organisation, is limited by the requirements of "free and voluntary" and "equitable basis."

A public school is a public forum and even in instances where the majority of the school adhere to a particular religion and form a religious organisation or identify themselves as a religious community, their action may not infringe on the rights of dissenters to be free from religious coercion and to conduct their own religious observances. This is a justifiable limitation of section 31 as it does not negate the rights of religious communities entirely, but simply limit their ambit in the school system, so as to ensure that their conduct is in accordance with the Schools Act and the Constitution. In this way the rights of adherents to minority religions are protected and they are not subjected to the convictions of the majority.

2 8 Best interest of the child

Finally, it is important to take note of the best interest of the child when considering religious observances within the public school system. The "best interest of the child" is a well-established standard in international human rights law.[120] It initially developed from a mere international aspiration voiced in the Geneva Declaration of 1924 to an almost universal principle that finds special recognition in the Convention on the Rights of the Child (CRC).[121] Section 3(1) of the CRC states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration." It is also recognised in section 4 of the *African Charter on the Rights and Welfare of the Child* (ACRWC),[122] which was drafted as a regional human rights instrument to address specific problems experienced by children in Africa.[123] The ACRWC provides that the best interest of

[120] S Coetzee & R Mienie "The best interest of the child standard in education: an overview of South African case law" (2014) 29 *SAPL* 90 92.
[121] 92.
[122] (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49).
[123] Coetzee & Mienie "The best interest of the child standard in education" *SAPL* 93.

the child be of "primary importance" in all matters concerning the child. It seems like the ACRWC affords more weight to the principle than the CRC, substituting "consideration" with "importance."

Section 28(2) of the Constitution, however, provides the most comprehensive protection to the rights of the child by stating that "[a] child's best interests are of paramount importance in every matter concerning the child." The use of the word "paramount" in the Constitution illustrates the weight attached to the "best interest of the child" and makes it a very important consideration when evaluating the role of religious observances in South African public schools. There are two prevailing theories as to how the "best interest of the child" must be interpreted. On the one hand, the more traditional view says that parents are responsible for the raising of their children, which include the right to educate them and transmit their values, including religious values, to them.[124] In terms of this approach, parents and teachers at school must act in the best interest of the child and their views prevail as long as they act lawfully.[125]

The other approach is founded on a rights-based or autonomous view of children, and is a more recent development in child law. In terms of this approach children are regarded as having their own view on what is in their best interest and they are accorded varying degrees of autonomy in accordance with their capacity to act and decide on their own.[126] This does not mean that parental authority is completely absent, but envisions that children will at least be consulted and their views acknowledged in any decisions affecting their physical, intellectual, emotional or moral upbringing. This accord with the notion that, in court cases affecting children, it is desirable and sometimes vital to allow the voice of the child to be heard as it will ensure a more nuanced interpretation of the best interest of the child.[127]

In South Africa, there is currently no legislation regulating the right of children to choose to be religious or not. In Germany for example, learners are allowed to choose to receive religious instruction in schools, or refrain from it, once they reach the age of 14 years. The CRC makes specific provision for the opinions of the child to be taken into account in any matters concerning them.[128] The weight that is attached to their opinion depends on various factors like their age and maturity. Within the context of religious observances in schools, it

---

[124] C Breen *The Standard of the Best Interest of the Child: A Western Tradition in International and Comparative Law* (2002) 70.
[125] R Malherbe "The constitutional dimension of the best interest of the child as applied in education" (2008) 2 *Tydskrif van die Suid-Afrikaanse Reg* 267 270.
[126] 270.
[127] *Pillay* para 56.
[128] Section 12.

might be advisable for the state to issue legislation that determines an age at which learners can decide for themselves whether they want to participate in observances or not. Learners often feel pressured by their parents, teachers, and peers, to adhere to the religion in which they were brought up. Allowing children, at a certain age, to elect to exercise their right to religious freedom could provide them with more autonomy over their spiritual lives.

Malherbe[129] suggests that what exactly is in the best interest of the child has to be determined in every individual case, based on all the relevant factors and considerations. Similar to adults, children are also bearers of the rights in the Bill of Rights, including the right to religious freedom. The application of religious freedom would, however, have to be informed by the best interest of the child. Religious practices or observances that could potentially endanger children or cause physical or emotional harm are not protected by section 15 of the Constitution, simply because it is not in the best interest of the child or children involved. When evaluating the right to conduct religious observances in public schools, cognisance must thus be taken of the particular impact it may have on children in light of their limited mental, emotional and physical capabilities.

One of the factors to consider is the nature of the relationships that prevail in a public school. The relationship between learners and teachers is one of authority, with teachers and the school at large, occupying a position of authority from where they must act in the public interest to protect learners' rights.[130] In *Centre for Child Law v Minister for Justice and Constitutional Development (NICRO as amicus curiae)*[131] Cameron J emphasised the relevance of section 28 in protecting children in unequal, authoritative relationships.[132] He found that "[a]mong other things section 28 protects children against the undue exercise of authority."[133] This is an important consideration with reference to religious observances. This authoritative relationship can easily be abused by teachers to coerce non-adhering learners to participate in religious observances contrary to their faith or beliefs. Children might feel obliged to comply with the order of a teacher to participate on account of the teacher's authoritative position.

Sometimes the authority can be abused in a much more subtle way. A teacher that exempts a non-adhering student from participation in a class prayer, but does so in front of all his peers, might be seen to respect the child's religious freedom, but the manner in which the

[129] "The constitutional dimension of the best interest of the child as applied in education" *TSAR* 268.
[130] Coetzee & Mienie "The best interest of the child standard in education" *SAPL* 95.
[131] 2009 (6) SA 632 (CC) ("*Centre for Child Law*") para 25.
[132] Coetzee & Mienie "The best interest of the child standard in education" *SAPL* 95.
[133] *Centre for Child Law* para 25.

exemption is carried out, can still be unduly coercive and in contravention of the child's best interest.[134] Although the coercion is not directly visible, the fear of being singled out might be so overpowering that the learner rather elects to stay in the class than suffer the embarrassment of leaving. Coetzee and Minnie[135] suggest that the attitude of the school community with regard to culture and religion is another factor to consider when assessing the best interest of the child in the context of religious observances. They argue that the best interest of the child is an important consideration when a child is admitted to a school where a religion or culture, other than their own, is dominant.[136] In these cases it is important to understand the isolating impact this might have on the non-adhering child and to consider carefully whether it would be in the child's best interest to expose them to possible alienation from their peers.

Later in this study, it will be argued that, upon a proper interpretation of section 7 of the Schools Act, read with section 15(2) of the Constitution, adequate protection can be afforded to the best interest of the child. When interpreting the restrictions of voluntariness and equity, the best interest of the child must inform the interpretation. In order to adhere to section 28(1), "equitable basis" and "free and voluntary" have to be interpreted in a way that mitigates the impact of religious observances on non-adhering students. Such an interpretation will aim at affording children a more or less equal opportunity to participate in the religious observances of their choice or allow for appropriate and non-coercive alternatives to those students who are not religious at all.

## 2 9 General limitation clause

From the discussion above, it is clear that religious freedom does not entitle the bearers of the rights complete freedom in the exercise and manifestation of their beliefs.[137] The rights in the Bill of Rights, including section 15, may be limited under the general limitation clause in section 36. Section 36(1) reads as follow:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

[134] See Chapter 5.
[135] "The best interest of the child standard in education" *SAPL* 95.
[136] 95.
[137] Van der Schyff *The right to freedom of religion in South Africa* 167.

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

Religious freedom may be limited in terms of "law" which includes legislation, common law and customary law.[138] The limitation must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." This provides the standard against which infringements of religious liberty are measured in order to determine whether the limitation is constitutional.[139] The standard requires that a proportional balance[140] be achieved between the limitation and the purpose of the limitation. In order to do so, the factors listed in section 36(1)(a) to (e) must be considered. These factors are not separate tests, but simply underscore the general substantive limitations test.[141] The weighing up of competing rights and interests is done on a case-by-case basis and the proportionality analysis is influenced by the unique circumstances of every scenario.

The nature of the right refers to what is being protected by the right and its general importance.[142] The more important the right is that is being infringed, the more compelling the justification for its limitation must be.[143] The Constitutional Court has pointed to the importance of religious freedom by describing it as having the "capacity to awake[n] concepts of self-worth and human dignity which forms the cornerstone of human rights."[144] The next factor relates to the importance of the purpose of the limitation and requires that the purpose of the limitation be identified, and its importance be established.[145] In light of the importance of religious freedom, the goal or purpose of a limitation of the right must not simply be marginal or trivial but must be of such grave importance that it justifies the infringement. Certain goals have been identified as possible reasons for limiting religious freedom. These include the promotion of equality, dignity and national unity,[146] the

[138] 168.
[139] 168.
[140] *S v Makwanyane* 1995 (3) SA 391 (CC) ("*Makwanyane*") para 149.
[141] Van der Schyff *The right to freedom of religion in South Africa* 174.
[142] 174.
[143] *Makwanyane* para 144.
[144] *Christian Education* para 36.
[145] S Woolman & H Botha "Limitations" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (2009) 34-73.
[146] *Islamic Unity* para 45-6.

protection of children from the indignity of corporal punishment,[147] the maintenance of public order,[148] the best interest of the child,[149] and the protection of the beliefs or rights of others.[150]

The third factor is the nature and extent of the limitation. This refers to the method used to limit the right and the impact it has on the protected right or interest.[151] The more invasive an infringement is, the more powerfully it must be justified.[152] The duration of the limitation can be important to determine the extent of the limitation. An infringement that lasts for a brief period of time may be more easily justifiable than a permanent limitation or one that lasts for a considerable period of time. Where the right is taken away completely, a very compelling justification needs to be provided.[153] Furthermore, a limitation that impacts on the core values underlying a particular right is not likely to be constitutional, while a limitation that just impacts on the periphery of the right will more than likely be considered justifiable.[154] Sometimes the position of the individual or group whose rights are being limited may also be important to determine the extent of its impact.[155] If the limitation targets or has a disproportionate impact on a vulnerable group in society such as religious minorities,[156] a higher level of justification will be required.[157]

The fourth factor is the relationship between the limitation and its purpose. This factor establishes whether the limitation can protect or promote the purpose.[158] The question is thus whether the means employed to achieve the purpose of the limitation are rationally related to the purpose, or at least reasonably capable of achieving the purpose.[159] Limitations of religious freedom must therefore at least be capable of achieving the object of the limitation and must not be so far removed from the purpose that no rational connection can be found.[160] The limitation must thus fit the objective as neatly as possible.[161]

---

[147] *Christian Education* para 39-50.
[148] *Universal Declaration of Human Rights* article 29(2).
[149] CRC art 3(1).
[150] See Woolman & Botha "Limitations" in Woolman et al *CLOSA* 34-75 for more examples.
[151] IM Rautenbach & EFJ Malherbe *Constitutional Law* (1999) 354.
[152] *S v Manamela & Another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC) ("*Manamela*") para 56.
[153] *Makwanyane* para 143.
[154] Woolman & Botha "Limitations" in Woolman et al *CLOSA* 34-79; *De Reuck v Director of Public Prosecution (WLD)* 2003 (4) SA 160 (T) ("*De Reuck*") para 59.
[155] Woolman & Botha "Limitations" in Woolman et al *CLOSA* 34-81.
[156] *Prince* para 51.
[157] Woolman & Botha "Limitations" in Woolman et al *CLOSA* 34-82.
[158] Van der Schyff *The right to freedom of religion in South Africa* 182.
[159] Woolman & Botha "Limitations" in Woolman *CLOSA* 34-84.
[160] Van der Schyff *The right to freedom of religion in South Africa* 183.
[161] 184.

Lastly, less restrictive means to achieve the purpose must be considered. Here the question is whether the same purpose can be achieved equally effectively by employing means that will have a less dramatic impact on the right that is being limited.[162] In the *Prince* case the court found that there were no other, less intrusive, means to achieve the purpose of combatting drug use. Lifting the ban on the use of dagga for Rastafarians was not considered a viable option and therefore no other, less restrictive measures were available.[163] There would usually be a range of alternatives that would be capable of achieving the same purpose and the consideration of these alternatives is aimed at ensuring that limitations of the rights in the Bill of Rights are narrowly tailored and do not restrict rights in an unnecessarily burdensome manner.

The Constitutional Court's jurisprudence on religious freedom usually includes a limitation analysis,[164] once a restriction of freedom of religion in section 15(1) has been established.[165] The nature of the interaction between section 15(2) and section 36 has however never been addressed in case law. The internal requirements of voluntariness and equity in section 15(2) can act as internal modifiers. Internal modifiers establish the content of the right,[166] which means that religious observances that are performed equitably and where attendance is free and voluntary, will comply with the right to religious freedom in section 15(1). Section 36 will play no role in these circumstances as the religious observances in question do not limit section 15(1) and can therefore not be challenged on the basis that they are not reasonable and justifiable in an open and democratic society. This seems to be the most logical reading of the requirements in section 15(2), as it will be highly unlikely that observances that are conducted on an equitable basis and the attendance of which is free and voluntary, will still amount to a limitation of the right to religious freedom that must be justified in terms of section 36.

Section 36 may however have a role to play if the religious observances do not meet the requirements in section 15(2). This will depend on how widely or how narrowly the courts will read the restriction of "equity". On a wide reading of "equity" many of the factors listed in section 36, as well as the values of human dignity, equality and freedom, will already be considered when determining whether the observances are conducted on an equitable basis

[162] 185.
[163] *Prince* para 129-142.
[164] Section 36 of the Constitution.
[165] *Lawrence*; *Prince*; Currie & De Waal *Bill of Rights Handbook* 341; The court in *Christian Education* simply assumed that a limitation of the right to religious freedom had taken place and proceeded to the limitation analysis without ever establishing that the right had been limited.
[166] Woolman & Botha "Limitations" in Woolman et al *CLOSA* 34-31.

and comply with section 15(2). On such a reading, a court, in considering whether religious observances are conducted on an equitable basis, will already weigh up the conflicting rights and interests of the school community and those of individual learners, and ask whether the aims of such observances could not be achieved in a manner that is less restrictive of the rights of the latter. A wide reading of "equity" will thus make section 36 redundant as many of the contextual considerations raised under section 36, would have already been addressed under section 15(2).[167]

Van der Schyff[168] illustrates this when he states that, by requiring the method of limitation to be "rules," the general provision that rights may only be limited by a law of general application is qualified. It narrows and refines the general requirement in section 36 and sets a higher standard for the exercise of religious observances. Furthermore, the requirements of "free and voluntary" and "equity" refine the general substantive test in section 36. It sheds light on the content of the reasonableness standard[169] and identifies what is considered a reasonable exercise of the right to religious observances. The restrictions also identify the purpose of the limitation of the right to religious observances. It is clear that they are aimed at achieving a measure of equity amongst religions and protecting individuals or groups from religious coercion. The fact that the purpose of the limitation is expressly mentioned amplifies the importance of the limitation of the right to conduct religious observances.[170] When considering the meaning of the restrictions in section 15(2), it is thus clear that many of the considerations related to section 36 have already been addressed and even refined within the particular context of religious observances.

Should "equity" be read narrowly, it could be argued that section 36 could still make a meaningful contribution in establishing the constitutionality of religious observances. It would then be possible for a court to find that the religious observances are not equitable or free and voluntary, but may still be reasonable and justifiable under section 36. Different contextual considerations will however have to be taken into account when establishing the

---

[167] In this instance section 15(2) will be handled in much the same way as section 9(3) of the Constitution, where courts have generally refrained from conducting a separate section 36 analysis when discrimination has already been established as unfair. The same considerations raised to demonstrate reasonableness and justifiability under section 36, will be considered in establishing the fairness of the discrimination, thus making section 36 a purely mechanical exercise that will inevitably lead to the same conclusion. Sections 26 and 27 also demonstrate this, as the requirement of reasonableness in these sections, will raise the same contextual considerations as "reasonable" in terms of section 36. To proceed to a section 36 analysis after the measures taken by the state was found to be unreasonable, will thus add very little to the inquiry. See *Khosa & Others v Minister of Social Development* 2004 (6) SA 505 (CC) paras 35-49.

[168] *The right to freedom of religion in South Africa* 188.

[169] 189.

[170] 189.

parameters of "equity", so as to ensure that section 36 still has a legitimate role to play in the inquiry.

Apart from the Constitution, the Schools Act forms an integral part of regulating religious observances in South African public schools.

### 3 South African Schools Act

The Schools Act was promulgated in 1996 in an effort to create a new national system for schools which will redress past injustices in educational provision, advance the democratic transformation of society and our diverse cultures and languages and uphold the rights of all learners, parents and educators.[171] Section 7 of the Schools Act addresses freedom of conscience and religion at public schools and states that:

> "Subject to the Constitution and any applicable provincial law, religious observances may be conducted at *public schools* under rules issued by the *governing body* if such observances are conducted on an equitable basis and attendance at them by *learners* and *members* of *staff* is free and voluntary."

The Schools Act delegates the power to make rules regarding religious observances in schools, to the school governing body. Governing bodies are thus the "appropriate public authorities" referred to in section 15(2) of the Constitution. Section 7 also imposes certain requirements for the way in which religious observances must be conducted. These requirements are almost identical to those in section 15(2) of the Constitution and also provide for "rules" to be issued by the governing body that must be "free and voluntary" and allow for religious observances to be conducted on an "equitable basis."

It is important to take note of the principle of subsidiarity in this context as it will explain the interaction between the Constitution and section 7 of the Schools Act. Subsidiarity, also sometimes called the principle of avoidance, was first laid down in *S v Mhlungu*[172] which stated that "where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed." Where there is thus a piece of legislation that makes provision for the protection of a particular right, the relief must principally be applied for in terms of the relevant legislation rather than placing direct

[171] Preamble of the South African Schools Act 84 of 1996.
[172] 1995 (3) SA 867 (CC) para 59.

reliance on the particular constitutional right.[173] The legislation may be challenged based on its non-compliance with the Constitution, but then the relief must be phrased as a constitutional challenge based on the premise that the legislation does not properly give effect to the constitutional right it seeks to protect.[174]

In the context of the public school system, section 7 of the Schools Act gives effect to section 15(2) of the Constitution and is an almost identical reflection of the wording of section 15(2). However, should any challenge be brought against the religious policy of a public school reliance would firstly have to be placed on section 7 of the Schools Act. The interpretation of section 7 will however be guided and informed by section 15(2) of the Constitution, read with the supporting rights in the Bill of Rights. Section 15(2) will only become directly relevant if the constitutionality of section 7 of the Schools Act is being tested for its compliance with the Constitution. Whereas legislation enacted to give effect to constitutional rights is often a comprehensive and detailed extension of the particular right, the legislature drafted section 7 of the Schools Act as a direct reflection of section 15(2). The interpretation afforded to section 7 of the Schools Act is therefore equally applicable to section 15(2) of the Constitution as they speak to the exact same requirements.

Furthermore, section 7 of the Schools Act specifies that governing bodies are also subject to the Constitution and applicable provincial law, which means that they are not allowed to conduct religious observances in a way that infringes any of the rights in the Bill of Rights or any provincial legislation regulating observances. Chapter 4 will deal with the nature and extent of the power of governing bodies to make rules on religious observances and will provide a more extensive discussion on the role of the Schools Act.

While the Constitution and the Schools Act did create a framework for religious observances in public schools, it did so in very general terms. What constituted "free and voluntary" and "equitable basis" was not specified. Many schools have abused the uncertainty of the constitutional and legislative framework to justify observances that arguably fall short of the constitutional and statutory requirements. It was only in 2003 that the Department of Education, under the leadership of Professor Kader Asmal, addressed the issue[175] when the National Policy on Religion and Education (2003) was published on 4 August 2003. The policy was the result of consultation with various stakeholders, including

[173] A Pieterse-Spies "Reasonableness, subsidiarity and service delivery: a case discussion" (2011) 26 *SAPL* 329 330; Bilchitz "Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality"* (2010) *South African Law Journal* 591 594.
[174] Pieterse-Spies "Reasonableness, subsidiarity and service delivery" *SAPL* 330.
[175] JL van der Walt "Religion in education in South Africa: was social justice served?" (2011) 31 *South African Journal of Education* 381 381.

religious groups, schools, parents and learners. It was heralded as a step in the right direction, but certain provisions created more difficulties and do not comply with Section 15 of the Constitution.

## 4 The National Policy on Religion and Education

From the outset, the Policy proposes that the interaction between religion and public education must be based on the co-operative model of religion-state interaction.[176] In the foreword to the Policy, the diversity of the South African population is stressed.[177] This diversity must be particularly evident in public schools where no particular religious ethos should be dominant over, and suppress others.[178] The Policy draws a clear distinction between the educational responsibility for learning about religions (religion education), and religious instruction and nurture that is provided by the home, family, and religious community.[179] Religion education is a curricular programme with educational objectives for teaching and learning about religion, religions and religious diversity in South Africa and the world, and is justified by the educational character of the programme.[180]

On the other hand religious instruction is understood to include instruction in a particular faith or belief, with the view to the inculcation of adherence to that faith or belief.[181] This is primarily the responsibility of the home, the family and the religious community and religious instruction may not be part of the formal school programme.[182] The Policy also makes provision for religious observances, which include voluntary occasions when the school community (teachers and pupils) gather for religious observances; observances held in a voluntary gathering of pupils and/or teachers during a school break; and observances that may be ongoing such as dress, prayer times and diets, which must be respected and accommodated in a manner agreed upon by the school and relevant faith authorities.[183]
School governing bodies are required to determine the nature and content of religious observances for teachers and pupils in alignment with the Policy and applicable legislation.[184]

---

[176] National Policy on Religion and Education (2003) section 4.
[177] B Wanda "Religion in public schools: some observances on the South African national policy on religion and education" in Russo CJ, Beckmann J & Jansen JD *Equal Education Opportunities: Comparative Perspectives in Education Law* (2005) 21.
[178] National Policy on Religion and Education (2003) Minister's Foreword.
[179] Section 1.
[180] Section 17 & 18.
[181] Section 54.
[182] Section 55.
[183] Section 59.
[184] Section 61.

Religious observances may be part of a school assembly, but must at all times accommodate and reflect the multi-religious nature of the country.[185] The Policy proposes various ways of accommodating religious diversity,[186] and clearly prohibits public schools from violating the religious freedom of pupils and teachers by imposing religious uniformity on a religiously diverse population in school assemblies.[187] Section 61 contains "[a]ppropriate and equitable means of acknowledging the multi-religious nature of a school community" by suggesting ways in which religious observances could be conducted in the public school setting. This includes:

> "1. The separation of learners according to religion, where the observance takes place outside of the context of a school assembly, and with equitably supported opportunities for observance by all faiths, and appropriate use of the time for those holding secular or humanist beliefs;
> 2. Rotation of opportunities for observance, in proportion to the representation of different religions in the school;
> 3. Selected readings from various texts emanating from different religions
> 4. The use of a universal prayer; or
> 5. A period of silence."

Other forms of equitable treatment may also be developed and where the segregation of learners is contemplated, a school has to consider and mitigate the impact of peer pressure on learners.[188] Learners may be excused on grounds of conscience from attending these observances and schools must make equitable arrangements for them.[189] Apart from these suggestions, the Policy does not prescribe specific ways in which religious observances at public schools must be organised, but rather encourages schools to devise creative and innovative approaches in this area.[190] Even though the Policy does provide some clarity on the format of religious observances, it still grants a wide discretion to governing bodies to determine the exact content of the observances and the rules governing the process.

The suggestions made by the Policy on equitable ways of treating religious observances are also constitutionally problematic. The Policy is subject to the Constitution and the

[185] Section 63.
[186] Section 61.
[187] Section 63.
[188] Section 61.
[189] Section 63.
[190] Section 65.

requirements of section 15(2) and must provide for observances and practices that do not violate any constitutional provisions. It will be argued in Chapter 6 that the idea of "rotation of opportunities for observances in proportion to the representation" and the "use of a universal prayer" does not necessarily amount to the equitable treatment of religions and can be unduly coercive.[191] It also seems as if the Policy endorses religious observances that reflect the multi-religious nature[192] of South Africa. It is unclear what exactly is meant by this section, but it almost seems to exclude single-faith events.[193] The Constitution does not prohibit observances in accordance with a single faith, but simply says that the observances may not be coercive or inequitable. Subjecting learners to multi-religious observances may be just as coercive as subjecting them to religious observances outside of their own faith. Denying all religions their section 15(2) right in favour of a multi-religious approach that does not satisfy anyone is constitutionally impermissible.[194]

Questions also arise as to the binding nature of the Policy. The Policy is not prescriptive, but rather creates a framework for schools and governing bodies to determine policies, and while schools are strongly encouraged to make use of the Policy, it does not seem to be legally enforceable.[195] Given the fact that governing bodies are independent from state control, with the mandate to manage the school, it is uncertain whether a school that fails to adhere to the Policy could be forced by the Department of Education, the Minister of Education, or a court to adopt a framework of religion-education interaction that reflects the Policy. This will presumably be subject to the extent to which the Policy itself survives constitutional scrutiny as it contains various problematic provisions. The discussion of voluntariness and equity later in the study will further address the problems with the Policy. It is submitted, however, that a review of this Policy is imperative, so as to bring it in line with section 15(2) of the Constitution.

## 5 International law

Section 39(1) of the Constitution states that courts must take notice of international law when interpreting the Bill of Rights. Various international law human rights instruments include sections pertaining to the right to religious freedom, religious education and the

[191] See Chapter 6 at 5 3.
[192] Section 61.
[193] R Malherbe "Enkele kwelvrae oor die grondwetlike beskerming van die reg op godsdiensvryheid" (2006) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 629 647.
[194] Chapter 5 & Chapter 6 further address the constitutional difficulties of the Policy.
[195] R Malherbe "The right to freedom of religion in South African schools: Recent disturbing events." (2004) 1 *International Journal for Educational Law and Policy* 248 256.

liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions. One of the most important international documents that South African courts have to take cognisance of is the *Universal Declaration of Human Rights* (1948). Article 18 guarantees the right to freedom of thought, conscience and religion, which includes the freedom of the individual to change his religion or belief. Furthermore, it includes the right, either alone or in a community with others and in public or in private, to manifest religion or belief through teaching, practice, worship and observance.[196] Article 26 of the Declaration states that everyone has the right to education, while subsection (3) affords parents a right to choose the kind of education that shall be given to their children. This article presumably includes the right of parents to send their children to religious schools and to have them educated in accordance with a particular religion.

The ICCPR makes provision in article 18(1) for the freedom of thought, conscience and religion of everyone. This includes the right not to be subjected to coercion which would impair the individual's freedom to have or adopt a religion or a belief of their choice.[197] Religious rights may only be limited by prescribed laws and only to the extent that is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[198] Furthermore, article 18(2) places an obligation on all the state parties to the Covenant to respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions. This includes the right of parents to send their children to religious schools. It does not necessarily imply that parents can insist that public schools provide religion-based education as the right in section 18(4) is not absolute and may be limited in order to protect the freedom of other individuals.

Article 1 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* also determines that everyone has the right to freedom of thought, conscience and belief. Article 5 makes special provision for the religious rights of children. Article 5(1) gives parents the right to organise the life within the family in accordance with their religion or belief, bearing in mind the moral education in which they believe the child should be brought up. Children also have the right to receive education in matters of religion or belief and may not be compelled to receive teaching on religion or belief against the wishes of their parents, the best interest of the child being the guiding

[196] Article 18 of the *Universal Declaration of Human Rights*.
[197] Article 18(2) of the ICCPR.
[198] Article 18(3).

principle.[199] Article 5(3) also protects children against discrimination based on religion or belief. The right to receive education on matters of religion in section 5(2) does not necessarily mean that public schools must provide children with a religion-based curriculum. It simply means that children may be educated about their religion by their parents, religious associations and institutions and, where the parents choose so, a religious school.

The *African Charter on Human and People's Rights* also protects the freedom of conscience and the free profession and practice of religion.[200] A very important international document relating to the religious rights of children is the already mentioned CRC. Apart from the emphasis on the best interest of the child, the CRC obliges the state to respect children's right to religious freedom and their parents' duty to provide direction to the child in the exercise of the right.[201] This right is however not absolute and the manifestation of religious beliefs may be limited by any law that is necessary to protect public safety, order, health or morals, or the fundamental freedom of others.[202] Furthermore, the CRC protects children from discrimination based on the religion or beliefs of the child or/and child's parents.[203] As mentioned above, the CRC makes special provision in article 12 for children who are capable of forming their own views, to express them freely in all matters affecting them. The weight attached to these views must be determined with reference to the age and maturity of the child. Children also have the right to freedom of expression[204] and the right to freely associate and assemble peacefully.[205]

The rights in the CRC are especially important as they are specifically aimed at protecting children. It creates a broad paradigm in which children may exercise their right to religious freedom, but makes the manifestation of religion subject to limitations imposed by law. The requirements for the conduct of religious observances in section 7 of the Schools Act, read with section 15(2) of the Constitution may be regarded as such a limitation. The requirements that it is free and voluntary and conducted on an equitable basis are aimed at protecting the fundamental freedoms of those that do not adhere to the prevailing religion. The emphasis on the best interest of the child in the CRC is also an important consideration and must be afforded considerable weight when evaluating the constitutionality of religious observances

[199] Article 5(2) of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.*
[200] Article 8 of the *African Charter on Human and People's Rights*.
[201] Article 14 of the CRC.
[202] Article 14(3).
[203] Article 2.
[204] Article 13.
[205] Article 14.

in public schools. When children are exposed to religious observances that can threaten their physical or emotional well-being, or be overtly coercive, the best interest of the child would prevail over any religious rights that may be infringed.

These international law instruments are important mechanisms to aid courts in striking the correct balance between the rights of children and their parents to participate in religious observances and the right of children to be free from religious coercion. South Africa, which is a party to all these international law instruments, must use them to inform the interpretation of section 15, and to help give content to the requirements of "free and voluntary" and "equitable basis."

## 7 Conclusion

The right to religious freedom is not a stand-alone right. Its interpretation must be informed by various other constitutional provisions, as well as international instruments. The right to equality, human dignity, freedom of expression, the right to assemble and demonstrate, the freedom to associate, the best interest of the child, the right to a religious community and the general limitation clause are all important constitutional provisions that must be taken into account when interpreting religious freedom and the right to conduct religious observances. Where rights compete, they must be weighed against each other to find an outcome that will best serve the interest of those whose rights are affected.

In the context of the school system, section 7 of the Schools Act gives effect to the right to conduct religious observances while the National Policy on Religion and Education attempts to guide governing bodies in the drafting of rules on observances. The National Policy on Religion and Education is however vague and contains provisions that are constitutionally problematic. It must comply with the requirements of the Schools Act and the Constitution and as suggested a review of the policy is imperative to bring it in line with the requirements of voluntariness and equity. The crux of the right to conduct religious observances in public schools remains section 7 of the Schools Act and section 15(2) of the Constitution. The next chapter aims to give content to these provisions and the way in which schools must practically go about the drafting of rules on observances.

# CHAPTER 4
# INTERPRETING SECTION 15(2) OF THE CONSTITUTION

## 1 Introduction

Section 15(2) of the Constitution, read with section 7 of the Schools Act, forms the core of the inquiry into the constitutionality of religious observances in public schools. It states that:

> "Religious observances may be conducted at state or state-aided institutions, provided that-
>
> (a) those observances follow rules made by the appropriate public authorities;
>
> (b) they are conducted on an equitable basis; and
>
> (c) attendance at them is free and voluntary."

Determining the meaning and scope of this section is central to establish the manner and the form religious observances must take in the public school context. As has already been mentioned, section 15(2) must not be read in isolation, but must be interpreted in such a way that it takes cognisance of the broader constitutional, legislative, and policy framework in which it functions.

The purpose of this Chapter is to analyse and interpret section 15(2) within the context of the public school system. A definition of "religious observances" has already been provided in Chapter 1[1] and in this Chapter the focus will rather be on the other elements of section 15(2). Firstly, the definition of "state and state-aided institutions" will be established in order to determine which schools fall within the scope of section 15(2) and have to adhere to the requirements set out in the Constitution. Secondly, the focus will fall on the meaning of "rules" and the question whether these rules must adhere to the principles of the rule of law. Lastly, "appropriate public authorities" will be analysed. This will include a discussion on section 7 of the Schools Act and the extent of the power of governing bodies to make rules about religious observances. Chapter 5 and Chapter 6 will respectively deal with the meaning of "free and voluntary" and "equitable basis" in section 7 of the Schools Act and section 15(2) of the Constitution.

[1] See Chapter 1 at 4.

## 2 Definition of "state or state-aided institutions"

Section 15(2) identifies "state and state-aided institutions" as the setting at which religious observances may be conducted. While is it clear that state institutions refer to the functionaries of the state that are controlled and funded by the state, the meaning of "state-aided institutions" is less evident. The court in the *Wittmann* case dealt extensively with the interpretation of "state-aided institutions". The case concerned a German school that was registered as a private school in terms of the Private Schools Act (House of Assembly) 104 of 1986[2] and received a discretionary subsidy from government, which at the time of going to court, amounted to more than R1 million annually.[3] The argument was that the financial support by government located the school within the parameters of a "state-aided institution" subject to the limitations of section 14(2) of the Interim Constitution. Van Dijkhorst J, however, found that this term had a very specific and narrow meaning within the context of education. State-aided institutions are neither public in the sense of completely state-funded and state-controlled, nor are they private institutions free from state-control.[4] These institutions lie somewhere in between and although they are not necessarily public, they are funded by the state to an appreciable extent and are subject to state regulation.[5] On this definition, all schools that are commonly known as "government"[6] or public schools will be considered as state-aided institutions subject to section 15(2) of the Constitution.

Private schools, although partially subsidised by government, are private institutions. Children attend these schools on a strictly contractual basis. This means that, should the school have a specific religious character or allow for religious observances associated with a particular faith, parents and children validly waive their rights under section 15(2) by agreeing to the terms of enrolment and subjecting themselves to the school's constitution and regulations.[7] In the *Wittmann* case the daughter of an agnostic mother was therefore not exempt from attending a religious education class as the court found that section 14(2) of the Interim Constitution was not applicable. The school was not a state-aided institution and the mother had waived her right to rely on section 14(2) by contractually agreeing to membership of the school within the limits of its constitution.[8]

---

[2] Section 6.
[3] *Wittmann* 64.
[4] Currie & De Waal *Bill of Rights Handbook* 331.
[5] 331.
[6] 331.
[7] *Wittmann* 76.
[8] 75.

**3 Meaning of "rules"**

Section 15(2)(a) of the Constitution and section 7 of the Schools Act specifies that religious observances must be conducted under "rules" issued by the appropriate public authority. Neither the Constitution nor the Schools Act specifies what form these rules must take. They are often incorporated as part of the mission statement or ethos of the school[9] or as a separate policy compiled by the governing body, ideally in consultation with parents, learners and teachers.[10] Whether these rules must comply with the requirements set for law of general application is however unclear.[11] Whereas mere policies, norms and practices issued by statutory bodies are not always viewed as laws of general application,[12] the use of the word "rules" is instructive, as it implies a certain formality of status. Governing bodies are organs of state,[13] performing a public function when formulating rules on religious observances. It can be argued that these rules must ensure parity of treatment; be enforced in terms of a discernible standard ensuring that there is no arbitrary exercise of power; be precise; and lastly, accessible to the affected individuals.[14]

The word "rules" in the Constitution and the Schools Act seems to oblige governing bodies to formulate a document that provides clarity to parents, teachers and children about the content and extent of religious observances, so as to ensure that the requirements for a law of general application are met. Firstly, these rules must ensure parity of treatment by treating similarly situated individuals alike, and provide the same privileges and impose the same restrictions on all stakeholders.[15] Governing bodies are consequently prohibited from formulating rules that have the effect of treating certain religions differently from others or differentiating between individuals based on their religious affiliation. Should the rules thus allow for Muslim learners to practise their religion separately from the Christian majority, the school must also allow Jehovah's Witness or Hindu learners to be accommodated in a similar manner.

The rules must also extend to all the parties involved in the school community. Should a teacher or the principal be the one to object to religious observances on grounds of

---

[9] Section 20(1)(c) of the Schools Act states that the governing body must develop the mission statement of the school; Thamm "Religion in Schools" *Daily Maverick*.
[10] G Dickinson & W von Vollenhoven "Religion in public schools: Comparative images of Canada and South Africa" (2002) 20 *Perspectives in Education* 1 14.
[11] Woolman & Botha "Limitations" in Woolman et al (eds) *CLOSA* 34-48, 50.
[12] 34-53.
[13] *Minister of Education (Western Cape) v Mikro Primary School Governing Body and Another* (2005) BCLR 973 (SCA) ("*Mikro*") para 20.
[14] Woolman & Botha "Limitations" in Woolman et al *CLOSA* 34-48, 50; *President of the Republic of South President of South Africa v Hugo* ("*Hugo*") 1997(4) SA 1 (CC) para 102.
[15] Woolman & Botha "Limitations" in Woolman et al *CLOSA* 34-48.

conscience, they too must be given the opportunity to be excluded from attending single-faith events or from conducting religious observances in class that are contrary to their own beliefs. It would not be fair to expect a Christian teacher to read to his class from the Koran every morning, while Christian learners are exempt from attending these readings.

Secondly, the rule of law requires that rules are enforced according to a discernible standard to ensure that there is no arbitrary exercise of power.[16] This means that the decisions made by the governing body about the content and extent of religious observances must be rationally related to the purpose for which the power was given.[17] The *Pharmaceutical Manufacturers* case makes it clear that determining rationality is an objective inquiry, which means that a mistaken or *bona fide* belief in rationality is not important when determining the arbitrariness of the rules in question.[18] Governing bodies are expected to act rationally, justify their choices and refrain from formulating rules that show a naked preference[19] or serve no discernible purpose.

Although this inquiry is objective, it is also context specific. Whether the rules formulated by the governing body meet the standard of rationality will depend on factors such as the religious demographic of the school community and the nature and form of the religious observances in question. The purpose of formulating the rules is to ensure the full enjoyment of religious freedom within the public sphere. Rules that negate this purpose will not pass constitutional muster. It is clear that preference can be given to a particular religion on the premise that the majority of the school community adhere to that religion. This choice must, however, be rational. It would arguably be more rational to conduct religious observances associated with the Christian faith when 90% of the children and teachers are Christian. In a school where 50% of the learners and teachers are Muslim, while 50% are Christian, it will be more difficult to justify rules that only allow for Christianity. And even where 90% of the school is Christian, religions must be treated equitably in terms of section 15(2) of the Constitution and section 7 of the Schools Act. If the rules around religious observances are not voluntary and equitable, they will not rationally meet their purpose.

Where provision is made for exemption on religious grounds, these rules must also be rationally related to the purpose for which they are formulated. Therefore, a school that conducts religious observances associated with Christianity cannot only allow for exemptions

---

[16] 34-48; *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) ("*Pharmaceutical Manufacturers*") para 85.
[17] Para 85.
[18] Para 85-6.
[19] *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC) ("*Prinsloo*") para 25.

for Muslim students while attendance is mandatory for learners adhering to African traditional religions. A provision like that will not only draw an unfair and unequal distinction between religions, but will be very difficult to relate rationally to the purpose of religious freedom. It is thus imperative that a governing body, when formulating these rules, take cognisance of the rationality requirement and the way in which it is informed by the unique circumstances of the school community in question.

Thirdly, the rules must be precise enough to allow individuals to conform their conduct to their dictates.[20] This means that they must be formulated and stated in a clear and accessible manner[21] and not be so vaguely worded that reasonable people differ fundamentally over their scope and extension.[22] The rules may also not be so broadly phrased or so far-reaching that it is difficult beforehand to know what exactly is allowed or prohibited.[23] Furthermore, rules may not grant officials, or in this case, governing bodies, principals and teachers, the unfettered discretion to use their powers as they see fit. Where discretion must be exercised, guidelines should be provided.[24] This requirement has a fundamental impact on the way in which rules surrounding religious observances in schools are formulated and presented to the school community. It would arguably not be appropriate for a governing body simply to determine that the school has a Christian ethos or character without formulating rules explaining the exact extent of the school's religious policy.

It seems that this requirement makes it imperative for governing bodies to formulate a document setting out the time, place and content of religious observances and provide a procedure for exemption on grounds of conscience. What is required is a clearly formulated policy that informs parents, learners and teachers about the nature of the school's religious ethos and character and the manner in which religious observances will be conducted during the school day. A properly drafted policy will eliminate many of the problems associated with religious observances as it will ensure that all stakeholders are clear on the nature of the religious observances that are conducted at the school and are able to follow the correct procedures should they wish to be exempt from participation.

It is also important that, should discretion be bestowed on an official of the school to decide something in respect of the religious policy, guidelines are provided for the exercise of this discretion. For example, should the principal have the final say with respect to the

[20] Woolman & Botha "Limitations" in Woolman et al *CLOSA* 34-49.
[21] *Dawood* para 47.
[22] Woolman & Botha "Limitations" in Woolman et al *CLOSA* 34-49.
[23] *Islamic Unity* para 44.
[24] *Dawood* para 47.

accommodation of a learner of a minority religion, he must do so with reference to certain criteria. These can include factors such as proof of a different religious affiliation, the wishes of the learner/parents and the suggestions made by them as to how the learner can be accommodated, as well as the practicability of providing an alternative to the attendance of the school's religious observances. In particular, weight must be afforded to the wishes of the learner and the parents. Where a learner or his parents insists that the learner be exempt from participating in religious observances of the majority, the discretion must be exercised in favour of the learner and the parents. A school that exercises its discretion against allowing an exemption from participation will infringe on the religious rights of the particular learner.

Finally, the rules must be accessible to the school community.[25] This requires that the policy be made publically available so that the school community can avail themselves of its content. A policy that is kept behind lock and key, and is only accessible to certain teachers, parents or learners will not meet constitutional standards and will arguably infringe on the right to religious freedom. In order to satisfy this requirement, it would be desirable that the school make the policy available to all potential parents, learners and teachers considering attending the school. This will enable them to make an informed choice when deciding to attend or to apply for a post at the school.

Procedures for exemption must also be explained from the outset, assuring parents, teachers and learners of the school's commitment to religious freedom. The power to make rules about religious observances, which is derived from the Constitution itself, must be exercised in a constitutional manner, taking cognisance of the rule of law and the requirements for a law of general application. A poorly drafted religious policy containing vague and arbitrary rules can potentially form the basis of a finding of unconstitutionality for its failure to comply with the standard and formalities implied by "rules" in the Schools Act and the Constitution.

## 4 The governing body as an "appropriate public authority"

The power to determine the religious observances of public schools in South Africa vests in the governing body of a public school. Section 7 of the Schools Act states that:

> "Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are

[25] Woolman & Botha "Limitations" in Woolman et al *CLOSA* 34-50.

> conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary."

The Schools Act delegates the power to make rules regarding religious observances to the school governing body. Governing bodies are thus the "appropriate public authorities" referred to in section 15(2) of the Constitution. Section 16 of the Schools Act makes provision for the creation of school governing bodies. The system of governing bodies was introduced after 1994 with the primary aim of democratising schooling in South Africa.[26]

The idea was that democratic governing bodies would involve various stakeholders in the school community which would ideally be representative of the diverse compilation of the school itself.[27] Governing bodies are intended to be sites of representative and participatory democracy[28] and the Schools Act provides governing bodies with considerable managerial power. They are able to determine the language policy of the school,[29] a code of conduct for learners,[30] admission policies, decisions pertaining to the appointment of staff[31] and the power to issue rules on religious observances.[32] These powers are a manifestation of the intended democratisation of the school system and the political drive to decentralise the management of public schools in South Africa.[33]

The principal in his or her official capacity must be a member of the governing body.[34] The other members are elected and must be representative of members of the following categories: parents of learners at the school,[35] educators at the school,[36] members of the staff at the school who are non-educators,[37] and, in the case of secondary schools only, learners must also be represented.[38] The chairperson of the governing body must be a parent and regardless of the size of the school, parents must always hold a majority of the member

---

[26] J Karlsson "The Role of Democratic Governing Bodies in South African Schools" (2002) 38 *Comparative Education* 327 328.
[27] 329.
[28] S Woolman & B Fleisch "Democracy, social capital and school governing bodies in South Africa" (2008) 20 *Education and the Law* 47 51; J Beckmann & I Prinsloo "Legislation on school governors' power to appoint educators: friend or foe?" (2009) 29 *South African Journal of Education* 171 174; J Heystek "School governing bodies in South African Schools: Under pressure to enhance democratisation and improve quality" (2011) 39 *Educational Management Administration & Leadership* 455 458.
[29] Section 6 of the Schools Act.
[30] Section 8(1).
[31] Section 20.
[32] Section 7.
[33] Heystek "School governing bodies in South Africa" *Education Management Administration and Leadership* 457.
[34] Section 23(1)(b) of the Schools Act.
[35] Section 23(2)(a).
[36] Section 23(2)(b).
[37] Section 23(2)(c).
[38] Section 23(2)(d).

representation. Members are elected for a three year term of office.[39] School governing bodies have the authority to make community-based decisions and are a popular means of political participation.[40] In affording parents, caregivers and learners who form part of the school community and live together in the area of the school, the opportunity to make decisions, they enhance participatory democracy.[41]

In terms of section 15 of the Schools Act, a public school is a juristic person with legal capacity to perform its functions.[42] The governing body is the functionary vested with original power in terms of the Schools Act to act as a duly appointed agent of a public school.[43] The power of a governing body refers to its legal capacity to perform its functions and fulfil its obligations in terms of section 16 of the Schools Act.[44] The courts have recognised the independence of governing bodies finding that, while they are organs of state performing a public function,[45] they are intended to be independent of state or government control in the performance of their functions.[46] Although governing bodies are subject to the Constitution, the Schools Act and any other provincial law, they are not part of the governmental hierarchy and are not, in relation to their functions, subject to executive control by the national, provincial or local spheres of government.[47]

Governing bodies do not, however, have absolute autonomy and the courts have suggested that there is a constitutional obligation on all partners in education to engage in good faith with each other.[48] In recent years a body of case law has developed dealing with the extent of a governing body's powers to manage schools. Although there has been no case law on the role of governing bodies in issuing rules on religious observances, cases around school language policies, pregnancy policies and admission policies have carved a framework for the way in which governing bodies should exercise their powers under the Schools Act. These cases serve as an illustration of the way in which management decisions must be taken

---

[39] Section 31(1).
[40] EM Serfontein & E de Waal "The effectiveness of legal remedies in education: A school governing body perspective" (2013) *De Jure* 45 51.
[41] 51.
[42] Beckmann & Prinsloo "Legislation on school governors' power to appoint educators: friend or foe?" *South African Journal of Education* 172.
[43] 173.
[44] 173.
[45] *Mikro* para 20.
[46] Para 22; *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) ("*Ermelo")* para 79.
[47] *Mikro* para 20, 22; Serfontein & De Waal "The effectiveness of legal remedies in education" *De Jure* 52.
[48] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State v Harmony High School and Another* 2014 (2) SA 228 (CC) ("*Welkom")* para 124.

and can provide a guideline for the manner in which governing bodies must approach the drafting of rules on religious observances.

4 1 Powers of school governing bodies: developments in case law

School governing bodies are created by the Schools Act and are not constitutionally mandated establishments.[49] As has already been mentioned, they enjoy extensive discretionary powers in the management of schools, but these powers may be limited by the Constitution, legislation and a decision by the state taken in terms of the legislation, or to protect a particular right or interest. Consequently, their functions can be altered and even eliminated by the state through the promulgation of legislation.[50] Any legislation or state decision that impacts on the discretionary powers of the governing body must, however, be justified and may not amount to an arbitrary exercise of power.[51] This creates an inevitable tension which has, in recent years, resulted in litigation that specifically addresses the extent of the powers of governing bodies and the manner in which they must be exercised. This section will analyse some of the case law in order to determine what impact it has on the manner in which rules around religious observances are formulated.

*4 1 1 Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others*

The *Ermelo* judgment concerned the constitutional right to be taught in the official language of one's choice and the power of the Head of Department (HOD) of Education to withdraw the function of a governing body to determine the language policy of the school.[52] Section 6(2) of the Schools Act states that "[t]he governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law." At the beginning of the 2007 school year there was a shortage of space in the Ermelo area for learners wanting to be taught in English.[53] Hoërskool Ermelo's language policy was Afrikaans medium, which meant that the school could only accommodate additional learners if they were willing to be taught in Afrikaans.[54] The Department of Education already approached the school at the beginning of 2006 requesting

[49] Serfontein & De Waal "The effectiveness of legal remedies in education" *De Jure* 52.
[50] 52; See section 22(1) of the Schools Act.
[51] Serfontein & De Waal "The effectiveness of legal remedies in education" *De Jure* 52.
[52] *Ermelo* para 1; Section 6(2) of the Schools Act.
[53] *Ermelo* para 11.
[54] Para 10.

accommodation for English medium learners.[55] The school refused the request, but agreed that the Department could use a disused laundry on the school premises to teach the learners.[56]

Through the course of 2006 the Department requested the school on numerous occasions to have the learners taught in proper classrooms, but the governing body steadfastly refused.[57] When the school year started in January 2007 the Department again requested that the learners be taught at Hoërskool Ermelo. The governing body refused and on 25 January 2007, the HOD summarily withdrew the function of the governing body to determine the school's language policy.[58] He then appointed an interim committee that was tasked with performing the section 6(2) function.[59] On the same day that the committee was appointed, it changed the school's language policy to parallel medium, allowing the learners to be taught in English at the school.

The HOD's decision was upheld in the High Court on the basis that the Schools Act vested the HOD with the authority to withdraw the power of the governing body to determine the language policy.[60] The decision was reversed by the Supreme Court of Appeal. In the Constitutional Court Moseneke DCJ found that the Schools Act does give the HOD the power to withdraw the powers of a governing body as long as there are reasonable grounds to do so.[61] Once the power has been withdrawn, it vests in the HOD who must then exercise the power for a specific remedial purpose. The court made no finding on the reasonableness of the decision to withdraw the power.[62] It instead found that the exercise of the power to withdraw the function to determine the language policy was tainted by the simultaneous decision to appoint an interim committee in terms of section 25 of the Schools Act.[63] The HOD did not have the power to appoint a committee to determine the language policy and the reliance on section 25 of the Schools Act was misplaced and incorrect. The withdrawal of the function and the appointment of the committee were therefore unlawful and set aside.

The court made some important remarks about the powers of governing bodies under the Schools Act. Moseneke DCJ stated that the preamble to the Schools Act expresses the intent to advance diverse cultures and languages and to uphold the rights of learners, parents and

[55] Para 12
[56] Para 13.
[57] Para 15.
[58] Para 21.
[59] Para 21.
[60] Section 22 of the Schools Act.
[61] This power derives from section 29(2) of the Constitution read with section 22 of the Schools Act.
[62] *Ermelo* para 74.
[63] Para 87.

educators.[64] An overarching design of the Schools Act is that public schools are run by three partners.[65] The Minister of Education represents the national government and his primary role is to set uniform norms and standards for public schools.[66] The provincial government is represented by the Member of the Executive Council (MEC) for Education. The MEC, together with the HOD in every province, exercises executive control over public schools through the principals.[67] Lastly, parents of the learners in the school and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.[68]

The court found that the primary function of the governing body was to promote the best interests of the school and the learners[69] as the parents of learners are better qualified to address the specific needs of the school. This does not, however, mean that the power to decide the medium of instruction in a public school is the absolute or exclusive preserve of the governing body.[70] It is made "subject to the Constitution, the Act and any applicable provincial law,"[71] and must be exercised subject to the limitations or qualifications in the Constitution and the Schools Act. The court found that the power to intervene and revoke a function of the governing body is authorised by the Schools Act itself as long as it is done on reasonable grounds and with a legitimate purpose.[72] What would constitute reasonable grounds have to be determined on a case by case basis taking into account all the circumstances that actuated the HOD to revoke the specific power of the governing body.[73]

In determining the reasonableness of the decision the court has to consider carefully the nature of the function, the purpose for which it was revoked in the light of the best interests of the children, and the impact of the withdrawal on the well-being of the school, learners, parents and educators.[74] These factors have to be weighed against the broad contextual framework of the Constitution.[75] In this case the court did not make a finding on the reasonableness of the decision to withdraw the power of the governing body and change the language policy of the school as the HOD misapprehended his powers and constituted the

[64] Para 55.
[65] Para 56.
[66] Para 56.
[67] Para 56.
[68] Para 56.
[69] Para 57.
[70] Para 58.
[71] Para 59; Section 6(2) of the Schools Act.
[72] Para 68.
[73] Para 74.
[74] Para 74.
[75] Para 74.

committee in an unlawful manner.[76] The court did however find that it would be just and equitable to all the concerned parties to direct the school to reconsider its language policy in light of the considerations set out in the judgment.

The governing body was ordered to report to the Court about the outcome of the review process within a specified period.[77] In revising the language policy, the court advised the governing body to take into account the interests of the community in which the school is located and not just the best interests of the learners that are in the school at the present moment.[78] This meant that the school had to have regard to the community in which the school is situated and ensure that the language policy also reflect the needs of the broader community of which the school forms part. The Court also directed the Department of Education to report to the Court on the steps it is taking to ensure that the demand for school place for grade 8s in the Ermelo area is met.[79]

The *Ermelo* decision is important as it was the first case to recognise the tripartite nature of school management and the need for all of these parties to cooperate in the governance of the school. It also clarifies that the powers the governing bodies derive from the Schools Act are not absolute and may be revoked or limited where it is reasonable and justifiable. The decision to revoke the power of a governing body must however be exercised in a procedurally correct way and must adhere to the rule of law. The *Ermelo* judgment was shortly followed by a case that addressed the power of governing bodies to determine pregnancy policies.

### *4 1 2 Head of Department, Department of Education Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School*

In 2008 and 2009 respectively, the governing bodies of Welkom High School and Harmony High School adopted pregnancy policies for their respective schools.[80] In terms of the policies learners who fall pregnant had to leave the school for a certain period of time before they could be readmitted.[81] Two pregnant learners approached the Department of Education after they were excluded in terms of the policies.[82] The HOD issued instructions to

[76] Para 93.
[77] Para 102.
[78] Para 99.
[79] Para 103.
[80] *Welkom* para 6.
[81] Para 7.
[82] Para 8, 15.

the principals of the schools compelling them to readmit the learners.[83] The schools then approached the courts seeking to interdict the HOD from interfering with the implementation of the policies. Both the High Court[84] and the Supreme Court of Appeal[85] found in favour of the schools on the basis that the HOD did not have the authority to instruct the principals to act in violation of the policies adopted by the governing body of the school.

The Department's appeal to the Constitutional Court was dismissed and Khampepe J, writing for the majority, found that, as a matter of legality, supervisory authority must be exercised in a lawful manner and in accordance with the Schools Act. With reference to the *Ermelo* judgment, the court held that under the Schools Act, public schools are run by a partnership involving the state, parents of learners and the community in which the school is located.[86] Each of these partners represents a particular interest in the school and bears the corresponding rights and obligations in the provision of education services to learners.[87] Khampepe J held that a governing body is akin to a legislative authority within the public-school setting and is responsible for the formulation of certain policies and regulations.[88]

These policies guide the daily management of the school and ensure an appropriate environment for the realisation of the right to education.[89] The Minister of Education is provided discretion under the Schools Act to determine guidelines regarding the content of codes of conduct, which must be considered by the governing body when formulating its policy.[90] This does not however mean that the HOD has any policy-making power for a particular school or the power to establish any binding pregnancy policies that must be implemented by the school.[91]

The decision of the HOD to flout procedure and override the schools' policies was therefore unlawful and had to be set aside.[92] The court found that an HOD who had reservations about a policy adopted by the governing body must engage in a comprehensive consultative process with the governing body regarding the policy.[93] If there are reasonable grounds for doing so, the HOD may then only take over the performance of the particular function in terms of section 22 of the Schools Act in order to give effect to the relevant

[83] Para 11.
[84] Para 22.
[85] Para 25.
[86] Para 49.
[87] Para 49.
[88] Para 63.
[89] Para 63.
[90] Para 68; Section 8(3) of the Schools Act.
[91] Para 68.
[92] Para 71.
[93] Para 72.

constitutional rights and the objects of the legislation.[94] The HOD could also approach the court for an urgent interdict prohibiting the implementation of the policy, or for an order reviewing and setting aside the policy.[95] The rule of law obliges an organ of state to use the correct legal procedures and in this case the court found that the HOD had failed in discharging its power within the constraints of the law.[96]

Khampepe J however acknowledged that the policies constituted a *prima facie* infringement of the constitutional rights of pregnant learners as they violated their rights to human dignity, freedom from unfair discrimination and the right to receive a basic education. The schools were ordered to review their policies in the light of the Constitution, the Schools Act and the considerations set out in the judgment.[97] The schools were also ordered to embark on a process of meaningful engagement with the HOD in reviewing the policies. The process of meaningful engagement had to be done in accordance with the principles of cooperative governance that are enshrined in the Schools Act.

In a separate and concurring judgment, Froneman J and Skweyiya J[98] agreed with Khampepe J's approach. They also found that, although this is a matter between the governing body and the HOD, the function of these bodies is primarily to serve the needs of the learners.[99] It was therefore argued that the matter must be approached in a way that places the best interests of the learners as the starting point. The duty of the parties to engage, cooperate and communicate in good faith must be contextualised by the learners' best interests.[100] Froneman J and Skweyiya J focussed on section 41(1)(h) of the Constitution that imparts an unequivocal obligation on organs of state to cooperate with each other in mutual trust and good faith.[101] This requires the governing body and the HOD to assist and support each other, inform each other, and consult on matters of common interest.[102] Their actions must be coordinated and they must, as far as possible, refrain from engaging in legal proceedings against each other.[103]

---

[94] Para 72.
[95] Para 72.
[96] Para 86.
[97] Para 126.
[98] Moseneke DCJ and Van der Westhuizen J concurred.
[99] Para 132.
[100] Para 132.
[101] Para 141.
[102] Para 141.
[103] Para 141.

*4 1 3 Member of the Executive Council for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others*[104]

The facts of the *Rivonia* case are similar to those of *Ermelo* and *Welkom* in that they deal with a decision of an HOD that sought to override a policy of the governing body of Rivonia Primary School. In 2010 a Grade 1 learner, residing within the feeder area of the school, was refused a place for the 2011 academic year and placed on a waiting list.[105] The school argued that it had reached its capacity of 120 learners as determined by the admission policy.[106] The HOD issued an instruction to the principal to admit the learner and overturned the decision of the school to refuse the learner admission to one of its Grade 1 classes.[107] Following the instruction of the HOD, the mother brought the learner to school, but the school refused to allow the learner access to a class.[108] The next day, officials of the Department of Education arrived at the school and physically placed the learner at an empty desk.[109] This followed a decision of the HOD to withdraw the principal's admission function and delegate it to departmental officials.[110]

The school brought an application for a declaratory order stating that the governing body had the power to determine the admission policy of the school and admit learners in accordance with the policy. The High Court dismissed the application,[111] but the Supreme Court of Appeal found in favour of the school, stating that the Department of Education did not have the power to override the admission policy of the school and that the HOD had acted unlawfully.[112] In the Constitutional Court, Mhlantla J, writing for the majority, held that the HOD did not exercise his power in a procedurally fair manner and dismissed the appeal. The court again considered the three-tier partnership between the national government, provincial government, and the parents of the learners and the members of the community.[113] The court found that, at school level, the governing body is, in terms of the Schools Act, responsible for determining the capacity of a school as part of its admission policy.[114]

---

[104] 2013 (6) SA 582 (CC) ("*Rivonia*").
[105] Para 9.
[106] Para 9.
[107] Para 12.
[108] Para 13.
[109] Para 14.
[110] Para 14.
[111] Para 20.
[112] Para 25.
[113] Para 36.
[114] Para 40; Section 5 of the Schools Act.

With reference to the *Ermelo* case,[115] the Court held that any power of the governing body must be "understood within the broader constitutional scheme to make education progressively available and accessible to everyone."[116] This power is, however, subject to other provisions in the Schools Act, which determine that the Department maintains ultimate control over the implementation of the admission decisions, and the MEC may consider admission refusals and overturn an admission decision taken at school level.[117] The power of the governing body to determine the capacity of the school as set out in the admission policy does not inflexibly limit the discretion of the HOD and he did have the power to admit the learner to the school.[118] This must however be done in accordance with the procedures set out in the Schools Act and must comply with the rule of law. As in the earlier judgments, the Court reiterated that cooperation is the compulsory norm in disputes between school governing bodies and national and provincial governments.[119] This cooperative approach is rooted in the shared constitutional goal of ensuring the best interests of all learners and furthering the right to a basic education.[120]

*4 1 4 Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another*[121]

The *Fedsas* judgment was delivered in 2016 and is the latest in the series of cases dealing with the powers of school governing bodies. The case concerns the Regulations Relating to the Admission of Learners to Public Schools under the Gauteng School Education Act 6 of 1995 that was published in 2012. The question before the Court was whether the Regulations are inconsistent with the Schools Act or applicable provincial law,[122] irrational, or not reasonable or justifiable.[123] In 2011 the MEC for education in Gauteng published the Regulations for comment.[124] In their comments on the Regulations FEDSAS argued that a number of the provisions encroached upon the powers of school governing bodies, and that their remit was beyond the empowering legislation.[125] They argued that the Regulations violated section 5 of the Schools Act that empowered the governing body to admit learners to

[115] *Ermelo* para 61.
[116] Para 61.
[117] *Rivonia* para 44.
[118] Para 54, 56.
[119] Para 77.
[120] Para 77.
[121] (CCT 209/15)[2016] ZACC 14 (20 May 2016) ("*Fedsas"*).
[122] Specifically section 11(1) of the Gauteng School Education Act.
[123] *Fedsas* para 6.
[124] Para 9.
[125] Para 10.

the school.[126] They further argued that the amended Regulations violated the principle of legality and were enacted in a procedurally unfair manner.[127]

The Respondents submitted that they gave the representations serious consideration and altered some of the draft amended regulations to meet the concerns that had been raised by FEDSAS and the other people and organisations that made submissions.[128] FEDSAS approached the High Court when the amended Regulations were promulgated and managed to have some of the provisions struck down.[129] The decision was reversed by the Supreme Court of Appeal, which found that there were no substantive or procedural discrepancies and that the Regulations were enacted in terms of section 11(1) of the Gauteng School Education Act.[130] The Constitutional Court only dealt with the validity of some of the regulations. Regulation 5(8) of the amended Regulations provides that despite "the provisions of any admission policy," the District Director may at the end of the admission period place any unplaced learner "at any school" that had not been declared full.[131] This regulation had to be read together with regulation 8 that makes provision for the HOD to determine the objective entry level learner enrolment capacity of the school.[132] This meant that the HOD now has the power to make a declaration on whether a school is full, or is able to accommodate more learners.[133]

FEDSAS contended that these regulations have the effect of ousting the governing body, a vital partner in terms of the Schools Act, from the admission process.[134] The Respondents argued that the powers are "narrow, defined and rational" with the purpose of placing all unplaced learners as required by the Constitution and the Schools Act.[135] Furthermore, the HOD's decision constituted administrative action that is judicially reviewable and provides a remedy for schools that are unhappy with a decision of the HOD.[136] The Court considered the conflict between the national legislation, namely the Schools Act and the provincial legislation, namely the amended Regulations. The Court specifically focussed on section 5(5) of the Schools Act which states that "[s]ubject to this Act and any applicable provincial law,

---

[126] Para 10.
[127] Para 10.
[128] Para 11.
[129] Para 13. This included regulation 2(2), Regulation 2(2A), regulation 3(7), regulation 4, regulation 5 read with regulation 8, regulation 11, and regulation 16.
[130] Para 14.
[131] Para 40.
[132] Para 40.
[133] Para 40.
[134] Para 41.
[135] Para 41.
[136] Para 41.

the admission policy of a school is determined by the governing body of such school." Moseneke DCJ, writing for a unanimous Court, found that this provision had two internal qualifiers.

Firstly, the governing body had to exercise its power subject to the Schools Act, as well as any other applicable provincial law.[137] With reference to the *Rivonia* judgment, the Court argued that the determination of an admission policy is subject to intervention by the provincial government in terms of the Schools Act or any other intervening mechanism provided for in provincial legislation.[138] Secondly, the court considered the role of public schools in South African society. It found that schools are public assets that must advance the interests of its immediate learners, as well as help in achieving universal and non-discriminatory access to education.[139] Against this background section 3(3) of the Schools Act allocates the duty to place unplaced learners in schools on the MEC.[140] Furthermore, the HOD may determine the learner enrolment capacity of a school and declare it to be full or not.[141] The Regulations sought to achieve this goal by providing a mechanism for the MEC and the HOD to perform their statutory duties that could be reconciled with the scheme of the statute.[142]

The court went on to address the specific role of governing bodies in schools. Moseneke DCJ stated that parents must engage in a meaningful way in the teaching and learning of their children.[143] The Schools Act provides for governing bodies, in order to ensure the democratic participation of parents and stakeholders in a way that advances the best interests of the learners at the school.[144] The Court again stressed the importance of cooperative governance and consultation between governing bodies and the state.[145] It reiterated the argument made in the *Welkom* case that there is a need for mutual trust and good faith between organs of state and that governing bodies and HODs must inform and consult one another on matters of common interest and avoid litigating against each other.[146]

*4 1 5 Summary*

[137] Para 43.
[138] Para 43; *Rivonia* para 41.
[139] *Fedsas* para 44.
[140] Para 45.
[141] Para 45.
[142] Para 46.
[143] Para 47.
[144] Para 47.
[145] Para 47.
[146] Para 47; *Welkom* para 141.

The judgments discussed above have laid down core principles regulating the interaction between governing bodies and the state. As a point of departure, a governing body must exercise the power to determine a policy on a particular aspect of school governance if the Schools Act empowers it to do so.[147] An HOD or other government functionary is not entitled to simply override this power where it is of the view that the policy or its implementation violates the Schools Act or the Constitution.[148] However, this does not mean that the power of the governing body is absolute or that the policy is immune to intervention.[149] The policy is also not inflexible and does not bind all decision-makers in all circumstances.[150]

A functionary is only allowed to intervene in the policy-making role of the governing body when the Schools Act or any other relevant legislation grants the functionary that power.[151] This serves to uphold the rule of law. Where it is necessary for an intervention the functionary must act reasonably and fairly.[152] Lastly, the process of intervention must be guided by the partnership model envisaged by the Schools Act as well as the cooperative government scheme set out in the Constitution. The governing body, as well as the relevant government functionary, are under a duty to engage in good faith on disputes about policies, and the engagement must be aimed at furthering the interests of the learners.[153]

## 5 The role of governing bodies in drafting rules on religious observances

The case law on the policy-making powers of governing bodies provides a framework in which section 7 of the Schools Act, read with section 15 of the Constitution, must be understood. Although there is no case law dealing specifically with the power of governing bodies to issue rules on religious observances, the powers to determine the language policy, pregnancy policy or admission policy of a school are analogous to the power to issue a religious policy. Similar legal principles can be applied to determine the nature and extent of governing bodies' powers. The first important consideration is the three-tiered partnership established by the Schools Act. The national government, provincial government, and parents and members of the community have certain powers and functions which are exercised through their duly appointed representatives. The governing body represents the learners, parents and the community in this partnership.

---

[147] *Rivonia* para 49; *Ermelo* para 73-5; *Welkom* para 74-6, 150.
[148] *Rivonia* para 49; *Ermelo* para 73-5; *Welkom* para 74-6, 150.
[149] *Rivonia* para 49; *Ermelo* para 78, 81; *Welkom* para 73, 149.
[150] *Rivonia* para 49; *Ermelo* para 78, 81; *Welkom* para 73, 149.
[151] *Rivonia* para 49; *Ermelo* para 88-9; *Welkom* para 36, 86.
[152] *Rivonia* para 49; *Ermelo* para 73; *Welkom* para 77, 150,
[153] *Rivonia* para 49; *Welkom* para 120-4; *FEDSAS* para 47.

When considering the constitutionality of the rules on religious observances the purpose of delegating the power to school governing bodies must be taken into account. As has been mentioned, governing bodies were established to ensure democracy within the education system so that schooling is no longer controlled by a centralist state as was the case under apartheid. Affording governing bodies the power to decide their own religious policy is a manifestation of this democratic ideal. Questioning the exercise of this power must thus be done with circumspection. Completely depriving governing bodies of the power to determine their schools' religious policies is arguably an infringement of the democratic rationale that underlies the concept of governing bodies. This will again centralise the power in the hands of the state, negating the power of school communities to regulate their own affairs. Allowing governing bodies an unfettered discretion in this regard would, however, leave the school community vulnerable to abuse by a body that might prefer a particular religion to the detriment of others.

Governing bodies have an obligation towards the learners, parents and community to act reasonably and fairly in performing their functions. The process of formulating rules on religious observances must allow for the needs of all religions to be considered in a fair and balanced way that does not show prejudice on the side of the governing body. A governing body is the voice of the entire school community - not just the majority. The rule-making process must reflect this inclusivity. It calls for all religions represented in the school community to be afforded an opportunity to make representations on the specific needs of their religion and the manner in which their religious observances may be accommodated in the school context. This can be done at a special meeting at the beginning of every year where the rules on religious observances are discussed. It can also take the form of written representations to the governing body setting out the needs of different religious groups.

It is also helpful for a school to determine the religious affiliation of learners when they commence their studies at the school. In this way a governing body can get a statistical perspective on the religious demographic of the school and decide how best to accommodate the learners. This must of course be done without prejudice to the learners, parents or teachers and without discrimination based on religion. A rule-making process that discriminates unfairly against a particular religion would be constitutionally impermissible and would affect the constitutionality of the resulting policy. Where some religions are not allowed an opportunity to be heard, or their representations are simply ignored, the policy would not meet the requirements of section 7 and section 15(2) and will violate the religious freedom of these learners, parents and teachers.

The second consideration that has to be taken into account when evaluating the power of school governing bodies to issue rules on religious observances, is that this power is subject to the Constitution, as well as "any applicable provincial law".[154] The power to determine a language policy and the power to issue rules on religious observances are both derived from the Schools Act and are subject to the Schools Act, the Constitution and any provincial law.[155] Similarly, the governing body's power to determine the admission policy of a school, that formed the basis of the *Rivonia* and *Fedsas* judgments, is also subject to the Schools Act, the Constitution and any applicable provincial law.[156]

As a point of departure, it is obvious that the rules on religious observances must comply with the Constitution. All law must comply with constitutional principles and section 15(2) has specific constitutional requirements that must be met when religious observances are conducted at state and state-aided institutions. The rules on religious observances are, however, also subject to any applicable provincial law as well as the provisions of the Schools Act itself. This means that, just as with the language policy, pregnancy policy and admission policy of the school, an HOD can in principle extend some measure of control over the way in which rules on religious observances are formulated and implemented. The first way in which this could be done is for the HOD to simply withdraw the function of the governing body through section 22(1) of the Schools Act. This must be done on reasonable grounds and by following the prescribed procedure set out in section 22(2)(a) - (c).[157]

The court in *Ermelo* determined that the reasonableness of the decision would be influenced by factors like the nature of the function, the purpose for which it was revoked in light of the best interests of the children, and the impact of the withdrawal on the well-being of the school, learners, parents and educators.[158] In the case of religious observances it would arguably be reasonable for the HOD to revoke the power of a governing body where it is clear that the governing body, through its policy, infringes on the religious rights of the learners, teachers and parents, and refuses to adjust its approach.

If a school has a policy that allows only for religious observances in line with the convictions of the majority while arbitrarily subjecting the minority to these observances, it could form the basis for an intervention by the HOD. Although the function to determine the

[154] Section 7 of the Schools Act.
[155] *Ermelo* case.
[156] Section 5(5) of the Schools Act.
[157] The HOD must have "(a) informed the governing body of his or her intention so to act and the reasons therefor; (b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and (c) given due consideration to any such representations received."
[158] *Ermelo* para 74.

religious rules of a school is an important one, the reason for revoking the power would weigh heavier in such a case. Religious rules that coerce learners towards a particular religion violate section 7 of the Schools Act and section 15 of the Constitution, as well as the right to dignity, the right to equality, freedom of expression, freedom of association, the right to a religious community, and the best interest of the child. The revocation is thus imperative to protect the best interests of the learners. What would constitute reasonableness would be dependent on the facts of each case, but as a matter of principle, governing bodies must realise that their power to determine rules on religious observances is not absolute.

Secondly, the power of governing bodies to issue rules on religious observances may also be limited through the enactment of provincial legislation, as recognised in the *Fedsas* judgment. It would therefore be possible for an act or regulations to be published in a province prescribing the manner in which governing bodies must draft rules on religious observances. Such a law would be subject to judicial scrutiny if, for instance, it completely negates the role of the governing body. It would also have to comply with the specific provisions of section 15(2) and may not be in conflict with the Constitution. In principle it would, however, be possible for legislation to provide a guideline for governing bodies on religious observances, or determine a specific procedure that must be followed when formulating the rules.

The third consideration is the importance of the best interests of the child. Although this has already been discussed in the previous chapter,[159] the case law on governing bodies' functions makes the best interests of the child a primary consideration. In *Welkom*, *Rivonia* and *Fedsas* the court emphasised that the function of the national government, provincial government and the governing body of a school is primarily to serve the needs of the learners. This must be understood against the background of the constitutional obligation to ensure that all learners receive a basic education. Any question about the exercise of a governing body's power must thus place the best interests of the learners as the first consideration. It is the background against which all functions must be exercised.

The best interests of the learners should influence all decisions made by governing bodies on the rules around religious observances. The *Ermelo* judgment even went as far as to suggest that this obligation extends beyond the current learner body, and might be applicable to the potential learners that form part of the community within which the school is

[159] See Chapter 3 at 2 8.

situated.[160] Practically, this requires the governing body to engage with the learners in order to determine their specific needs. It also means that a governing body that does not serve the best interests of the learners might open itself up to have its power revoked by the HOD. This will allow learners to voice their needs, giving effect to section 28 of the Constitution and article 12 of the CRC that makes specific provision for the opinion of children in all matters affecting them. A governing body must also be mindful of the religious needs of the community within which the school is situated. If the religious demographic of the community is changing, religious observances must adapt to accommodate potential learners. Public schools that define themselves as having a particular religious character or ethos can alienate learners, parents and teachers who do not adhere to the religion at the school. This is not in the best interests of the community or the children that form part of the community and must be considered by schools when formulating their religious policy.

The last consideration that emerged from the case law is the need for governing bodies and the state to cooperate and engage in a meaningful way on matters of school governance. Section 41(1)(h) of the Constitution requires that organs of state cooperate with each other in good faith and mutual trust. The Schools Act enshrines the principle of cooperative governance and foresees a process based on mutual cooperation and respect. Where the parties deal with a matter of common interest there is an obligation to consult, inform, assist and support the other party in executing the function.[161] In both the *Welkom* case[162] and the *Fedsas* judgment[163] the court emphasised that governing bodies and HODs must refrain from litigating against each other on issues of common interest and rather engage meaningfully and in good faith.

However, the case law discussed above illustrates a worrying trend of governing bodies and national and provincial government engaging in court action over the scope of their respective powers. Governing bodies seem to view their powers as absolute, while the Department of Education, through its various representatives, often ignore procedures and legislation to bully governing bodies into complying with its instructions. The principle of cooperative governance requires both parties to comply with the rule of law and attempt to address differences in a way that preserves the working relationship between them and provide an outcome that is in the best interests of the children they serve. Furthermore,

[160] Para 90.
[161] *Welkom* para 141.
[162] Para 141.
[163] Para 47.

"meaningful engagement" has developed as a "participatory constitutional remedy" that ensures direct engagement between parties in socio-economic rights litigation.[164]

Although it developed as a remedy within the sphere of housing and eviction law, the cases discussed above illustrate that courts are increasingly ordering parties in education litigation to engage with each other in an attempt to find their own solutions to the dispute. This remedy is usually accompanied by a structural order in terms of which the parties must provide feedback to the court on the progress that has been made. Liebenberg[165] suggests that the court must set normative parameters within which the process of engagement must be conducted in order to ensure that some form of agreement is reached.

It is submitted that meaningful engagement must form part of the interaction between governing bodies and the state from the moment a dispute arises.[166] By the time a case reaches court, the relationship between the parties has usually broken down irrevocably and an order of meaningful engagement just frustrates the process.[167] Litigation can be avoided if the parties cooperate in good faith, listen to each other's arguments, and ensure that the best interests of the children remain the overarching principle that guides the engagement process. The power to issue rules on religious observances lies primarily with the governing body, but, as has already been mentioned, this is not an absolute and inflexible power. Where a dispute arises over the content of a religious policy or the manner in which it is implemented, there is an obligation on both the governing body and the state to cooperate in finding a solution to the problem. The crux should not be which of the parties is right or wrong, but rather what is in the best interests of the children affected by the dispute. An approach like this will go far in avoiding litigation and preserving the relationship between the parties.

It is also important for the parties to engage meaningfully when formulating the rules. This does not necessarily mean that the Department of Education must send representatives when the rules are being drafted, but it does mean that the governing body must at least take cognisance of the state's stance on religious observances in schools. Although the National Policy on Religion and Education is only a guideline, and is in itself problematic, it is worth the time of the governing body to at least take notice of the suggestions made in the Policy.

---

[164] S Liebenberg "Deepening democratic transformation in South Africa through participatory constitutional remedies" (2014) *National Journal of Constitutional Law* 1 13.

[165] S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: the possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *African Human Rights Law Journal* 1 27.

[166] NR Watt *A critical examination of 'meaningful engagement' with regard to education law* (2014) unpublished LLM dissertation, Pretoria: University of Pretoria 34.

[167] See *Juma Musjid Primary School v Essay No* 2011 (8) BCLR 761 (CC) for an example where meaningful engagement was unsuccessful, partially as a result of the deteriorated state of the relationship between the parties involved.

This is part of the process of cooperative governance and ensures that the governing body does not become a force distinct from any checks and balances. It is also submitted that the Department of Education might need to invest in the appointment of a body of overseers that review the religious policies of schools, and assist and train them on the process of formulating rules on religious observances. This should not result in the governing body losing autonomy over the rules they formulate, but must rather exist as a guiding hand that acts in good faith to ensure that the best interests of learners are promoted.

A body like this can consist of representatives of various religions and religious organisations as well as representatives of the Department. It could evaluate the rules of a school for compliance with section 7 of the Schools Act, read with section 15(2) of the Constitution or any of the supporting rights in the Bill of Rights. It is also suggested that the Department of Education embark on a process of formulating a clearer policy on religion and education that determines a specific process for the drafting of the rules on religious observances. Many governing bodies exploit the lack of oversight and regulation to conduct religious observances in an arbitrary and unconstitutional manner. It is often not even conducted in line with specific rules, but is simply based on an overarching religious character or ethos. Stricter guidelines, proper oversight, and the training of governing bodies will go far to protect the rights of learners, teachers and parents in the school system.

## 6 Conclusion

Section 7 of the Schools Act, read with section 15(2) of the Constitution, establishes the framework for the drafting of rules on religious observances. As public schools constitute state-aided institutions governing bodies are subject to the requirements of section 15(2). The power of governing bodies to make rules on religious observances is not absolute. It is subject to the Constitution and legislation and, as is illustrated above, may be challenged in a court of law. The rules that they draft must comply with the rule of law and be clearly formulated and readily available for all parties to avail themselves of its content. The use of the term "rules" implies a formality of status that calls for the drafting of a proper policy on religious observances. This is imperative to ensure that religious observances are conducted in a legitimate and transparent manner.

Furthermore, the case law on the powers of governing bodies provides guidelines for the manner in which the power under section 7 of the Schools Act must be exercised. It is a power that may be limited by legislation or even completely revoked. It must also be exercised in a manner that takes cognisance of the three-tiered school governance

relationship. Most importantly, the governing body is subject to the interest of the children that they serve. Governing bodies must always be guided by what would be in the best interest of the children in all decisions that they take and, when drafting the religious policy of the school, this should be their primary consideration. They represent all the learners and cannot act in a way that negates and undermines the religious rights of some of the learners over the religious rights of others. The rule-making process must be characterised by consultation, close cooperation and meaningful engagement with all relevant stakeholders in order to ensure the most equitable outcome for a particular school. This is both a constitutional obligation and a practical measure to ensure that disputes are limited and religious observances are in line with the needs of the pupil body. The next chapter will focus specifically on the requirement of voluntariness in section 7 of the Schools Act, read with section 15(2)(c) of the Constitution.

# CHAPTER 5
# FREE AND VOLUNTARY

## 1 Introduction

Section 7 of the Schools Act and section 15(2)(c) of the Constitution require that the attendance of religious observances be free and voluntary. On the face of it this seems simple enough, allowing people to choose the religious observances they feel comfortable partaking in, so as to respect their individual autonomy and their personal religious convictions. "Free and voluntary" is, however, a more complex concept and may be read in one of two ways. On the first reading, voluntariness is the absence of *direct* coercion, where people are directly forced to participate in religious observances or practices that contravene their own religious beliefs. On the second reading, voluntariness further requires the absence of *indirect* coercive pressure. Here, it is assumed that, even where attendance and participation are formally voluntary, the collective social impact of the religious observances may nevertheless cause subtle pressure to conform to the norms of the prevailing religion. The Constitution fails to specify how widely this requirement must be read, but Chaskalson P in the *Lawrence* case found that, regardless of the form the pressure takes, coercion must be established to give rise to an infringement of religious freedom.[1]

It is thus imperative to the application of section 15(2) that clarity is provided as to whether it is sufficient that the attendance of and/or participation in religious activities not be compulsory,[2] or if something more is required. With the exception of a few brief remarks on indirect coercion in *Lawrence,* no South African court has pronounced on the correct approach to "free and voluntary." It is clear that direct religious coercion would constitute an automatic infringement of section 15(1) as it would render the observance neither free nor voluntary. The Constitutional Court in *Lawrence* has, however, alluded to a broader reading of section 15(2) that takes cognisance of the subtle ways in which religious observances can impact on non-adherents. By authorising official religious observances and requiring them to be free and voluntary, the drafters of the Constitution have set the courts the difficult task of grappling with the constitutionality of observances that are free and voluntary in a formal sense, but that may nevertheless amount to a form of indirect coercion.[3]

This chapter asks how the phrase "free and voluntary" in section 7 and section 15(2) must be understood, with specific reference to the challenges posed by indirect forms of coercion.

---

[1] *Lawrence* para 104.
[2] Farlam "Freedom of religion, belief and opinion" in Woolman et al *CLOSA* 41-52.
[3] Smith "Freedom of religion under the final constitution" *SALJ* 221.

Firstly, the direct and indirect approaches will be discussed in order to determine their meaning and scope. Secondly, the focus will be on the way in which foreign jurisdictions have opted to interpret voluntariness in the context of religious freedom in public schools. The approaches of the American, Canadian and German courts will be analysed in order to discern the various rights and policy considerations that come into play when interpreting "free and voluntary." Lastly, a model will be proposed for understanding "free and voluntary" in the context of the Constitution. Drawing on the experiences of comparative jurisdictions and considering the unique historic, social, religious and constitutional context of South Africa, the aim is to provide an understanding of voluntariness that ensures the protection of all stakeholders' rights.

## 2 Approaches to "free and voluntary"

As has already been mentioned, there are two approaches to understanding "free and voluntary." A narrow reading of this requirement prohibits direct forms of coercive pressure where it is blatantly obvious that the participation in religious observances is not the result of an unfettered and autonomous decision by the participating individual or group. This narrow interpretation fails to take into account subtle forms of coercion. A more nuanced reading of section 15(2)(c) of the Constitution and section 7 of the Schools Act takes cognisance of the factors that can interplay to render a seemingly voluntary observance or practice involuntary. What follows is a discussion on the definition of direct and indirect coercion, focussing on the advantages and disadvantages of each approach.

### 2 1 Direct Coercion

Direct coercion denotes overt, express, explicit or blatant pressure[4] exercised by someone (usually in a position of authority) upon someone else to engage in or refrain from religious practices or observances. Non-compliance is usually met with some form of penalty, fine, sanction, or the loss of a benefit.[5] This form of coercion is *direct* as the coercer, intentionally and openly, confronts the coerced individual or group with the choice of conforming to the religious activity in question or facing the adverse consequences.[6] Most jurisdictions that protect citizens' right to religious freedom prohibit direct religious coercion. On a narrow reading of section 15(2)(c) and section 7, voluntariness implies that learners, teachers and

[4] RJ Ahdar "The nature of religious coercion" (2009) *ExpressO* <http://works.bepress.com/rex_ahdar/1> (accessed 08-08-2015) 5.
[5] 5.
[6] 5.

parents are at least afforded the option of attending and partaking in religious observances, allowing for exemption for conscientious objectors.[7] This reading eliminates the danger of learners, teachers and parents feeling directly pressured or coerced towards a particular religion and ensure their freedom to make an enlightened choice about the observances they are exposed to.

In *Lawrence*, Chaskalson P stated that the compulsory attendance of school prayers would infringe the right to religious freedom[8] and would consequently be unconstitutional. This prohibition is also recognised in international law: article 18(2) of the ICCPR states that "[n]o one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice." Included in this prohibition is the use of threat or physical force or penal sanctions to compel believers or non-believers to adhere to certain religious beliefs and congregations, to recant their religion or belief or to convert.[9] Policies or practices that have a similar intention or effect would also amount to an infringement of the right to religious freedom, in violation of article 18(2).[10]

The ICCPR refers to the deprivation of state educational or medical benefits for non-compliance as examples of direct coercion.[11] Other examples include an imposition of a tax-penalty for non-adherents or detention for learners that refuse to participate in religious observances in school. The American case of *Kerr v Farrey*[12] illustrates direct coercion well. In this case a prisoner at a Wisconsin minimum security facility was classified as a higher security risk for refusing to attend religious-based narcotics rehabilitation meetings. This affected his eligibility for parole and the Seventh Circuit Court of Appeals found that the state had coerced him to participate in the religious programme. The lack of a secular alternative constituted an infringement of his right to religious freedom as the prisoner could not exercise this right without being severely penalised for his choice.[13]

The advantage of adopting only this narrow understanding of coercion is that it is usually easily ascertainable by a court. Courts are not expected to delve into the realm of psychology or sociology in an attempt to discern the impact of a seemingly voluntary observance or practice on the psyche of an individual or group. This eliminates the danger of judges,

---

[7] Smith "Freedom of religion under the final constitution" *SALJ* 221.
[8] *Lawrence* para 103.
[9] Human Rights Committee General Comment No. 22, 5. UN Doc. CCPR/C/21/Rev.1/Add 4 (1993).
[10] Human Rights Committee General Comment No. 22.
[11] Human Rights Committee General Comment No. 22.
[12] 95 F. 3d. 472 (7th Cir 1996).
[13] See *Raines v Siegelman*, 2006 W.L. 691236 (MD Ala) where a religious-based program was found not to infringe on religious freedom as a result of the availability of a secular alternative.

advocates, and lawyers attributing experiences or emotions to claimants without the necessary knowledge or training.[14] Furthermore, this approach does not take cognisance of coercion of a *de minimis* character, giving effect to the principle that the law does not concern itself with trivialities.[15] Consequently, the legal system is not burdened with eradicating every miniscule and insubstantial instance of coercion, but can rather focus on those instances where a clear infringement of religious freedom has occurred and a remedy is available.[16]

The South African Constitutional Court has addressed this argument in the *Lawrence* case. Sachs J warns against a too ready application of the *de minimis* principle where decisions are made about "sensitive and not easily measurable questions such as freedom of conscience, belief and opinion."[17] He states that:

> "One of the functions of the Constitution is precisely to protect the fundamental rights of non-majoritarian groups, who might well be tiny and hold beliefs considered bizarre by ordinary faithful. In constitutional terms, the quality of a belief cannot be dependent on the number of its adherents nor on how widespread or reduced the acceptance of its ideas might be, nor, in principle, should it matter how slight the intrusion by the State is."[18]

Sachs J seems to suggest that the *de minimis* principle will very rarely be considered a sufficient defence where even a slight form of coercion is present. From this it is quite clear that the right to religious freedom envisioned by the Constitution requires more than the mere absence of direct religious coercion. The crux of "free and voluntary" in section 7 of the Schools Act, read with 15(2), lies in how broadly indirect coercion is framed in the South African context, taking into account the wording of the section as well as the rights and policy considerations that underlie the right to religious freedom.

### 2 2 Indirect coercion

A broader understanding of coercion considers the psychological, social and peer pressure a person may experience[19] when confronted with the choice of adhering to the observances of the prevailing religion or exercising the right to exemption. Indirect coercion is usually present in cases where attendance of or participation in religious activities is, in a strict

[14] Ahdar "The nature of religious coercion" *ExpressO* 16.
[15] *De minimis non curat lex;* Ahdar "The nature of religious coercion" *ExpressO* 22.
[16] *Edwards Books* 34-35.
[17] *Lawrence* para 160.
[18] Para 160.
[19] Ahdar "The nature of religious coercion" *ExpressO* 9.

formal sense,[20] free and voluntary and allowance is made for exemption on grounds of conscience. On the face of it, individuals are thus afforded a choice to either adhere to or refrain from participation and the pressure to conform is not met with an official sanction or penalty as is the case with direct coercion. The pressure to conform is, however, the result of a collection of factors such as peer pressure, the fear of being ostracised or vilified for dissenting religious convictions, unattractive alternatives to the prevailing religious practice or observances, and a fear of embarrassment or stigmatisation for disregarding the norm. Chaskalson P points to the "pervasive peer pressure" that is often present in the school community, resulting in learners, teachers and parents feeling coerced to conform to the majority's religion.[21] In the absence of a direct penalty for non-adherence, these factors act as the subtle sanctions imposed on dissenters.[22]

This is especially true in cases where the minority religions constitute a very small part of a state or state-aided institution's religious demographic, making it more difficult for minorities to take an individual stand against a system that seems to favour the beliefs of the majority.[23] In the *Lawrence*[24] case, O'Regan J points to this phenomenon of "power, prestige and financial support" being placed behind a particular religious belief, indirectly putting coercive pressure on religious minorities to forego their personal beliefs. This is particularly concerning in the context of the public school system where children are affected. They are often too emotionally and intellectually immature to understand the complexities of religion, making them more vulnerable to the influences of religious coercion. Peer-pressure and the need to fit in can subtly force children to conform, at the expense of their personal religious convictions.

Advocates for the indirect approach argue that it addresses the practical realities associated with religious activity.[25] It avoids the "formalism" of the direct coercion approach,[26] resulting in a more sensitive and nuanced model for assessing the possible impact on religious freedom. Furthermore, it allows for a more inclusive perspective on the role of religion in the public sphere, focussing not only on those pressures that are blatantly obvious, but casting the

---

[20] 5.
[21] *Lawrence* para 103.
[22] CV Ward "Coercion and choice under the establishment clause" (2006) 39 *Faculty Publications: University of California* Paper 101 1622 1647 <http://scholarship.law.wm.edu/facpubs/101> (accessed 08-08-2015); *Lee v Weisman* 505 US 577 (1992) ("*Lee*"); *Santa Fe Independent School District v Doe* 530 US 290 ("*Santa Fe Independent School District*"); Devenish *The South African Constitution* 91-2.
[23] *Lawrence* para 103.
[24] Para 120.
[25] Ahdar "The nature of religious coercion" *ExpressO* 25.
[26] *Lee* 595.

net wider to include instances of coercion that can subtly infringe on the basic rights of religious minorities.[27]

Critics, however, argue that the indirect coercion test is based on subjective and imprecise evaluations of intangible phenomena that make it difficult for courts, with a limited knowledge of psychology and sociology, to determine if coercion is present or not.[28] Indirect coercion is a "manipulable label"[29] that is, as a result of its subjective nature, unpredictable and open to abuse by claimants with a personal agenda. Regardless of this concern, courts in other jurisdictions have not been deterred from interpreting indirect coercion and detecting its existence in the cases brought before them. Secondly, it is often argued that indirect coercion is the result of religiously diverse societies and that being compelled to choose to participate in religious observances is not in itself unconstitutional.[30] Furthermore, it is not the responsibility of the state to insulate children from every instance of religious peer pressure.[31] The pressure to conform is simply a consequence of living in a pluralist society and must be dealt with in the same way as all other social pressures, where social isolation is often the price of conscience or non-conformity.[32]

Although this is a compelling argument, there is a distinct difference between religious coercion in the context of the public school system and other social pressure. The pressure a child may feel to participate in religious observances conducted at the school is the result of an institutionalised system of coercion bought about by the endorsement by the school of a particular religion. As a result of this endorsement a learner may feel pressured by the school, teachers, other learners, and parents to conform. This is different from the social pressure a child might experience from friends to use drugs or participate in illegal activities. In that instance, the pressure is usually only between peers and is not endorsed by the school community. Furthermore, the pressure to use illegal substances or to perform illegal acts is usually condemned by the school as morally and socially unacceptable.

This is not necessarily the case with the pressure to conform to a particular religion, where adherents of the preferred religion and the school at large can view this type of coercion in a positive light as it is aimed at converting non-adherents. It is submitted that the state cannot protect children from religious coercion in every instance and a certain tolerance to religious

[27] MA Peterson "The Supreme Court's coercion test: insufficient constitutional protection for America's religious minorities" (2001) 11 *Cornell Journal of Law and Public Policy* 245 266.
[28] Ahdar "The nature of religious coercion" *ExpressO* 31.
[29] *Lee* 632.
[30] *Zylberberg v Sudbury (Board of Education)* (1988), 52 DRL (4th) 577 616 ("*Zylberberg*").
[31] *Elk Grove Unified School District v Newdow* 542 US 1 (2004) 44; *Zylberberg* 616.
[32] *Lee* 97-8.

pressure must be fostered in children if they are to function as part of a pluralist society. A distinction must, however, be drawn between the potential seriousness of religious coercion in the school system and that of other social pressures that are simply a part of growing up and living in a social environment.

The indirect coercion approach can also have the effect of completely removing religious practices, observances and symbolism from the public sphere that in itself can constitute a threat to religious freedom. This critique will be discussed below with reference to Canada where the indirect approach has inadvertently acted as an equivalent to the Establishment Clause in American law.[33] In South Africa, this is an important concern, as a too wide interpretation of indirect coercion can negate the existence of section 15(2) altogether, rendering all religious activities in the public sphere unconstitutional. This can tilt the neutrality of the state disproportionately and unequally in favour of an atheistic understanding of the world. Unless it is the clear intent of a constitution to create a society where religion is exclusively part of the private sphere, indirect coercion must be interpreted to avoid this unintended consequence.

Some jurisdictions have opted to remove all religious observances from the public school system as a result of the indirect coercive effect it can have on learners, teachers and parents. Especially in America and Canada, a vast body of case law has developed in response to religious activities in schools. These jurisdictions have repeatedly applied the indirect coercion test to invalidate all forms of religious practices in the public school system. In contrast, Germany's Basic Law[34] allows for religious education in schools in accordance with the tenets of the religious community, although no teacher may be obliged to give religious instruction against his will. Like the South African Constitution, the framers of the German Basic Law left the right to decide the content and the nature of religious observances to the school community, on the condition that participation be free and voluntary. The next section provides an overview of the ways in which these three jurisdictions have opted to interpret "free and voluntary."

## 3 Indirect coercion from a legal comparative perspective

Section 39(1) of the Constitution states that, when interpreting the Bill of Rights, courts may take notice of foreign law. The American, Canadian and German jurisdictions have been

[33] MH Ogilvie "Between liberté and egalité: religion and the state in Canada" in P Radan, D Meyerson & R Croucher (eds) *Law and Religion* (2005) 134-167.
[34] See section 7(2) and (3) of the German Basic Law.

chosen for various reasons. Firstly, these countries represent different ways in which indirect coercion can be interpreted in the public school system. American courts have found indirect coercion to be an infringement of religious liberty, primarily because it violates the Establishment Clause that prohibits any interference by the state in religious matters. Canadian courts have reached a similar conclusion despite the clear absence of an Establishment Clause. The Canadian Charter of Human Rights ("The Charter") does not contain any reference to religious observances in the public sphere, but courts have interpreted indirect religious coercion so widely that, as in America, any form of subtle coercion is considered to be a violation of religious freedom. Although the Charter did not necessarily foresee a wall of separation between the state and religion, the interpretation of indirect coercion has inadvertently resulted in such a separation.

The German Basic Law provides for religious education in the public school system. Perhaps as a result of this provision, religious observances are commonplace in Germany's inter-denominational schools. Unlike their American and Canadian counterparts, the German courts have found certain religious observances constitutional, despite the existence of indirect coercion. They have rather opted for a narrower reading of indirect coercion that is based on a balancing of competing rights and policy considerations. An analysis of these diverse approaches is aimed at enlightening the interpretation afforded to indirect coercion in South Africa. By examining the factors that informed the choices of other jurisdictions, similarities and differences can be pointed out to construct a unique South African model of indirect coercion in line with the Constitution.

### 3 1 United States of America

The right to religious freedom is addressed in the First Amendment of the American Constitution which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof […]." This right is two-fold. The first part of the Amendment is commonly known as the Establishment Clause, providing freedom from government interference in religious matters.[35] The second part of the Amendment is referred to as the Free Exercise Clause that protects the individual's right to religious freedom, belief and practice.[36] The First Amendment consequently guarantees both government neutrality

[35] I Muehlhoff "Freedom of religion in public schools in Germany and the United States" (2000) 28 *Georgia Journal of International and Comparative Law* 405 408.
[36] 408.

towards religion and the individual's liberty in choosing and practising a religion.[37] The American courts' jurisprudence on religious freedom, and especially religious observances and practices in schools, is extensive and complex. Many of the questions raised in the context of the Constitution after 1994, have been dealt with in America since the mid-1900s.

As has already been mentioned, the American courts give a very wide interpretation to indirect coercion which regards almost every form of religious activity in schools as unconstitutional for its potentially coercive effect. Although it is quite clear that this extreme approach was not envisioned by the Constitution, it is still important to consider the American position in this regard to form a better understanding of the policy considerations, rights and values that underlie indirect coercion. Most of the American cases that dealt with religious activity in schools have been decided under the Establishment Clause, with indirect coercion considered to be an infringement of this constitutional principle.[38] The most extensive interpretation of the Establishment Clause is provided by the Supreme Court in *Everson v Board of Education*.[39] The court states that:

> "[n]either a state not the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organisations or groups and vice versa. In the words of Jefferson, the clause against establishment or religion by law was intended to erect a wall of separation between the church and the State."[40]

This section from the *Everson* judgment has become the cornerstone of Establishment jurisprudence. The attitude of strict separation and absolute government neutrality has informed almost all subsequent judgments related to religious activities in schools and the

[37] 408.
[38] M Strasser "The coercion test: on prayer, offence, and doctrinal inculcation" (2009) 53 *Saint Louis University Law Journal* 417 418.
[39] 330 US 1 (1947) ("*Everson*").
[40] 15-6.

impact of indirect coercion.[41] It is, however, not within the scope of this study to discuss all of the case law dealing with religious practices in American schools. This section will rather aim to provide a brief overview of the manner in which American courts have opted to interpret indirect coercion and its relation to the Establishment Clause.

Initially, the relationship between indirect coercion and the Establishment Clause was unclear.[42] *Engel* dealt with the required daily recitation in New York public schools of a non-denominational prayer composed by the State Board of Regent[43] and was the first case to address the type of coercion that would constitute a violation of Establishment Clause guarantees. Although learners were afforded the option of absenting themselves from the room while the prayer was being recited,[44] this observance was still found to be unconstitutional. Writing for the majority, Black J referred to historical evidence to conclude that the First Amendment was enacted to try to end government control of religion and prayer.[45] The official school prayer violated the fundamental purpose underlying the First Amendment.[46] The court in *Engel* made it clear that the Establishment Clause is not dependent "upon the showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."[47]

It was acknowledged that the recital of prayers placed non-adherents in a difficult position, having to choose between leaving at the risk of potential adverse consequences and staying to partake in observances that did not coincide with their own religious beliefs.[48] The court rejected the claim that the danger of coercion was too trivial to constitute a true infringement, arguing that permitting this incursion on religious liberty might permit more serious

---

[41] See *McCollum v Board of Education* 333 US (1948); *Zorach v Clauson* 343 US 306 (1952); *Engel v Vitale* 370 US 421 (1962) ("*Engel*"); *School District of Abington Township v Schempp* 374 US 203 (1963) ("*Schempp*"); *Lemon v Kurtzman* 403 US 602 (1971) ("*Lemon*"); *County of Allegheny v American Civil Liberties Union, Greater Pittsburgh Chapter* 492 US 576 (1989) ("*American Civil Liberties Association*"); *Lee; Board of Education of Kiryas Joel Village School District v Gumet* 512 US 687 (1994); *Santa Fe Independent School District*.

[42] Strassen "The coercion test" *Saint Louis University Law Journal* 418.

[43] *Engel* 422.

[44] *Engel* 436; The lower courts (*Engel v Vitale* 206 NYS 2d 183 (NY App Div 1960)) and the New York Court of Appeals (*Engel v Vitale* 176 NE 2d 176 (NY 1961)) upheld the statute and the school board's practice on the ground the learners were not forced to attend and join in the prayer if they or their parents objected to it. See Muehlhoff "Freedom of religion in public schools in Germany and the United States" *Georgia Journal of International and Comparative Law* 460.

[45] *Engel* 435.

[46] 424.

[47] Muehlhoff "Freedom of religion in public schools in Germany and the United States" *Georgia Journal of International and Comparative Law* 430.

[48] 430; Strassen "The coercion test" *Saint Louis University Law Journal* 420.

incursions in the future.[49] The court, however, failed to make plain whether coercion was a *necessary* element to show that the Establishment Clause had been violated.[50] It was also unclear how broadly coercion must be understood and if every instance of alleged coercion, direct and indirect, would be regarded as a threat to religious freedom.

In 1963, shortly after the judgment in *Engel*, the Supreme Court considered the constitutionality of two school prayer statutes[51] in *School District of Abington Township v Schempp*. In both cases the statutes made provision for the reading of at least ten verses from the Holy Bible at "the opening of each public school on each school day."[52] Upon the written request by their parents, children could be excused from participating in this religious observance.[53] The court held that the First Amendment places the government in a position of neutrality that "stems from recognition of the teachings of history that powerful sects or groups might bring about a fusion of government and religious functions."[54] In order to establish whether government action is neutral, the court formulated a two-pronged test. Firstly, government action must have a secular purpose, and secondly it must create a primary neutral effect.[55] This means that government action must neither advance nor discriminate against religion. The legislation allowing for compulsory Bible reading was found to advance religion, detracting from the secular purpose of government action and breaching the principle of neutrality.[56]

In *Schempp* the court also clarified some of the uncertainty created by the *Engel* judgment with respect to the existence of coercion. A father of three minor children argued that his children felt coerced to participate in the reading of the Bible verses although it was free and voluntary. He refrained from seeking exemption for his children because he was afraid it would adversely affect their relationships with their teachers and the other learners.[57] The court in *Schempp* suggested that the presence or absence of any form of coercion is irrelevant to questions arising under the Establishment Clause.[58] As in the *Engel* case, it was also contended that the choice to participate freely and voluntarily meant that the observance did not violate any constitutional principles. This argument was rejected by the court, noting that

[49] *Engel* 436.
[50] Strassen "The coercion test" *Saint Louis University Law Journal* 420.
[51] In Maryland and Pennsylvania.
[52] *Schempp* 205.
[53] This exemption was only added while the appeal of the decision in the lower court was pending in the Supreme Court and did not form part of the original statute.
[54] *Schempp* 215, 222.
[55] 222.
[56] 225.
[57] 208.
[58] 223.

while proof of coercion could provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause.[59] From this case it seems as if religious observances in public schools are unconstitutional regardless of the existence of coercion or not. The focus rather seems to fall on the endorsement of religion by the state, which violates the principle of state neutrality that forms the core of the Establishment Clause.

Before 1971 courts followed several approaches to assessing Establishment Clause challenges.[60] In *Lemon* the Supreme Court tied all the criteria together for a newly formed three-part test that would form the basis of Establishment Clause jurisprudence until the early 1990s.[61] Although this case did not deal expressly with religious observances in the public school system, it raised the related concern of the state providing financial support to aid church-affiliated schools. Burger CJ formulated what would commonly become known as the *Lemon* test as follows: "Firstly, the statute must have a secular legislative purpose; secondly, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster an excessive government entanglement with religion."[62] The problem with the *Lemon* test was that it failed to properly address coercion and its place in Establishment Clause cases.[63] The test was also developed in a somewhat different context than the cases dealing with religious observances, as coercion hardly featured on the facts of the *Lemon* case. Regardless of this obvious shortcoming the *Lemon* test was applied to religious observance cases until 1992.[64]

In *Wallace v Jaffree*[65] a father, on behalf of his minor children, challenged an Alabama statute that allowed public schools to begin each day with a period of silence for meditation or voluntary prayer.[66] The particular school his children attended maintained regular prayer services and Jaffree alleged that "teachers had on a daily basis led their classes in saying prayers in unison."[67] This had subjected his children to "various acts of religious

---

[59] 222-3; Strassen "The coercion test" *Saint Louis University Law Journal* 424.
[60] Meuhlhoff "Freedom of religion in public schools in Germany and the United States" *Georgia Journal of International and Comparative Law* 417.
[61] 417.
[62] *Lemon* 612-3.
[63] See Peterson "The Supreme Court's coercion test: insufficient constitutional protection for America's religious minorities" *Cornell Journal of Law and Public Policy* 248; *Lee*.
[64] See *Lee* and Ward "Coercion under the Establishment Clause" *University of California, Davis* 1628 for a complete discussion on the difficulty of interpreting and applying the *Lemon*-test.
[65] 472 US 38 (1985) ("*Wallace*").
[66] 41.
[67] 42.

indoctrination,"[68] as well as exposing them to "ostracism from their peer group class members if they did not participate."[69] Applying the *Lemon* test, the court found the law unconstitutional as it had no clear secular purpose.[70] A statute already existed that permitted for meditation and the new statute which provided for prayer as well was found to be an attempt to return prayer to the public schools.[71]

In a concurring judgment, O'Connor J suggests *obiter* that there is a distinction between state-sponsored prayer and the state allowing for a moment of silence during which learners can pray or reflect.[72] Unlike *Engel* and *Schempp* where the learners were afforded the choice to participate, thereby compromising the non-adherent's beliefs or drawing attention to their non-conformity,[73] the allowance for a moment of silence is not inherently religious.[74] O'Connor J argues that the time can be used for non-religious reflection or meditation.[75] Partaking in a moment of silence does not compromise the beliefs of the individual as they are left to their own thoughts and are not compelled to listen to the thoughts or prayers of others.[76] This analysis touches on the notion that coercion can play a role in determining the constitutionality of religious observances, but fails to explain the interaction between coercion and the test in *Lemon*.

In 1989, Kennedy J in his dissent in *American Civil Liberties Union* offered the first sustained defence of a coercion theory of Establishment Clause jurisprudence.[77] The case dealt with the placement of two religious holiday displays outside the Allegheny County Courthouse and the City-County Building. The majority of the court followed the test laid down in *Lemon*, but in his dissenting opinion, Kennedy J offered his understanding of the limitations imposed by the Establishment Clause.[78] He states that "government may not coerce anyone to support or participate in any religion or its exercise; and it may not […] give direct benefits to religion in such a degree that it in fact establishes a religion or religious faith, or tends to do so."[79] He further explains the relation between these conditions, suggesting that it would be difficult to "establish a religion without some measure of more or

[68] 42.
[69] 42.
[70] 56.
[71] 59.
[72] 72.
[73] 72.
[74] 72.
[75] 72.
[76] 72.
[77] Strasser "The coercion test" *Saint Louis University Law Journal* 426.
[78] 247.
[79] *American Civil Liberties Association* 659.

less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing."[80]

Kennedy J seems to suggest that a broad approach to coercion could aid in establishing the limits imposed on the state by the Establishment Clause.[81] This theory depends heavily on the interpretation afforded to coercion.[82] In attempting to flesh out the meaning of coercion, he notes that the Court had "invalidated actions that further the interests of religion through the coercive power of government."[83] Citing examples from cases that had been decided by the Court, he identifies the following as potentially coercive practices: "compelling or coercing participation or attendance at a religious activity,"[84] "requiring religious oaths to obtain government office or benefits,"[85] and "delegating government power to religious groups."[86] However, not all of these cases dealt with coercion, making his argument somewhat unconvincing.[87] He also fails to formulate a sufficient coercion test. It would be left to the court in the watershed *Lee* to determine the parameters of such an approach.[88]

The challenge in *Lee* involved a school policy in which local members of the clergy were invited to give invocations and benedictions at public school graduations.[89] Attendance of this part of the graduation ceremony was free and voluntary[90] and non-attending learners still received their diplomas. The court in *Lee* did not expressly reject the *Lemon* test, but the majority seemed to suggest that a coercion analysis should proceed before any application of *Lemon*.[91] The court held that it need not consult the other tests for Establishment Clause violations because "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[92] Kennedy J identified liberty as a central concern of both the Establishment Clause and the Free Exercise Clause,

---

[80] 659-60.
[81] Strasser "The coercion test" *Saint Louis University Law Journal* 427.
[82] 427.
[83] *American Civil Liberties Association* 660.
[84] With reference to *Engel*; 660.
[85] With reference to *Torcaso v Watkins* 367 US 488 (1961); 660.
[86] With reference to *Larkin v Grendel's Den, Inc* 459 US 116 (1982); 660.
[87] For a full discussion on the difficulties of the Kennedy J dissent see Strasser "The coercion test" *Saint Louis University Law Journal* 427-33.
[88] The coercion test in *Lee* is, however, rooted in Kennedy J's dissent in *American Civil Liberties Association*.
[89] *Lee* 577; They were usually invited by the principal and given a pamphlet entitled "Guidelines for Civic Occasions" that recommended a non-sectarian prayer emphasising "inclusiveness and sensitivity." The invocation and benediction mentioned "God" twice and "Lord" once.
[90] *Lee* 586.
[91] Peterson "The Supreme Court's coercion test" *Cornell Journal of Law and Public Policy* 248.
[92] *Lee* 587; Ward "Coercion under the Establishment Clause" *University of California, Davies* 1632.

cautioning against "subtle coercive pressure in the elementary and secondary public schools"[93] that could infringe on this liberty. The court found that prayer exercised in public schools carries a particular risk of indirect coercion and that although this pressure is not limited to the school context, it is most pronounced there.[94] The majority explained that:

> "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."[95]

In light of the argument that the attendance of the prayer was free and voluntary, the court explained the meaning of coercion within the context of Establishment Clause violations as follows:

> "The school district's supervision and control of a high school graduation ceremony places subtle and indirect public and peer pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction. A reasonable dissenter of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it. And the state may not place the student dissenter in the dilemma of participating or protesting. Since adolescents are often susceptible to peer pressure, especially in matters of social convention, the state may no more use social pressure to enforce orthodoxy than it may use direct means. The embarrassment and intrusion of the religious exercise cannot be refuted by arguing that the prayers are of a *de minimis* character, since that is an affront to the rabbi and those for whom the prayer have meaning, and since any intrusion was both real and a violation of the objectors' rights."[96] "The pressure, though subtle and indirect, can be as real as any overt compulsion."[97]

At the core of this test is the "principle that government may accommodate the free exercise of religion," but this does not "supersede the fundamental limitations imposed by the Establishment Clause."[98] At a minimum, the American Constitution "guarantees that government may not coerce anyone to support or participate in religion or its exercise, or

[93] *Lee* 592.
[94] 592.
[95] 593-4.
[96] 592.
[97] 593.
[98] 592.

otherwise act in a way which establishes a religion or religious faith or tends to do so."[99] The court also suggests that in determining coercion, the impact of the religious observance must be viewed from the perspective of the dissenter and not the adherents.[100] Eight years after *Lee*, the coercion test was applied in *Santa Fe Independent School District* in which a Santa Fe high school provided for student-led prayer at the opening of their home football matches. The policy provided for an election to determine whether there would be a prayer before the football match and, if the majority voted in favour, a second election determined which student would deliver the prayer. Attendance of this part of the game was free and voluntary for all students. Stevens J found that the "student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority."[101] Furthermore, "fundamental rights may not be submitted to vote"[102] and this practice failed to protect the fundamental rights of dissenters.

The policy only allowed for non-sectarian and non-proselytising prayers,[103] but the court found that there was a very clear bias towards prayers with a religious content and message.[104] The fact that the football match, unlike the graduation ceremony in *Lee* that is an almost obligatory part of attending high school, was absolutely voluntary made no difference to the court. They noted that for some learners, such as cheerleaders, football players, and band members the attendance of the match is mandatory and may even be a prerequisite for class credits, while others have social obligations that require their presence at the match.[105] It was consequently found to be "formalistic to the extreme" to assume that high school learners felt no social pressure to attend sport events, or have a genuine desire to participate in extracurricular activities where religion may be observed.[106] In both *Lee* and *Santa Fe Independent School District* the court considered three important issues that played a role in the coercion analysis, namely, the institutional setting of the activity, the institution's control over the activity, and the impressionability/vulnerability of those within the institution.[107] The court suggested that the consideration of these factors and the determination of an

[99] 587.
[100] 592.
[101] *Santa Fe Independent School District* 2276.
[102] 2276.
[103] 2271.
[104] 2277.
[105] 2280; Meuhlhoff "Freedom of religion in public schools in Germany and the United States" *Georgia Journal of International and Comparative Law* 405.
[106] *Santa Fe Independent School District* 2280.
[107] Peterson "The Supreme Court's coercion test" *Cornell Journal of Law and Public Policy* 251.

Establishment Clause violation must be conducted with reference to the particular social facts of the case before it.[108]

Ward[109] argues that the coercion test, as formulated in *Lee* and *Santa Fe Independent School District*, does not appear to require any intentional organisation by the school or the state to create peer pressure and, even in the absence of any intent, the actions will still be unconstitutional. The existence of coercive pressure is enough to constitute a violation of the Establishment Clause. Since its formulation in *Lee* and refinement in *Santa Fe Independent School District*, the coercion test has been applied in subsequent cases in the lower courts, shedding further light on the nature and scope of the test. In *Coles v Cleveland Board of Education*[110] the Sixth Circuit Court found the practice of praying before board education meetings to be a violation of the Establishment Clause.[111] There was no indication that the teacher or the learner who had complained about the prayer were likely to change their religious beliefs.[112] The court found that coercion was sufficient for a finding of unconstitutionality, but not a necessity.[113] The state is seen to act coercively when the negative social impact of the religious observance is a reasonably foreseeable consequence of requiring the religious dissenter to make the choice between participating or not.[114] It is thus possible to have a violation of the Establishment Clause without ever having shown any real direct or indirect coercion.

The court in *Coles* also alluded to the idea that the number of learners potentially coerced by the religious observance is not important. There is consequently no need to show that several children were being coerced. The court stated that "the heightened review given to school-sponsored prayer does not turn on any particular children-to-adult ratio, above which prayers are prohibited, but below which they are constitutionally permissible."[115] It thus matters more that young minds are religiously coerced rather than that some threshold number of children are the victims of the coercion.[116] This contrasts with some other jurisdictions like Germany that recognise the impact of religious coercion on learners, but are only willing to mitigate its effect when a threshold number of learners are affected. In cases

[108] *Lee* 598; *Santa Fe School District*.
[109] "Coercion under the Establishment Clause" *University of California, Davies* 1647.
[110] 171 F 3d (6th Cir 1999) 374 ("*Coles*").
[111] 369.
[112] 374.
[113] 379.
[114] Ward "Coercion under the Establishment Clause" *University of California, Davies* 1660.
[115] *Coles* 382.
[116] Strasser "The coercion test" *Saint Louis University Law Journal* 455.

where the number of learners falls below the threshold, there seems to be an assumption that the learners must simply bear the burden.[117]

In American law the concept of coercion, and especially indirect coercion, has developed over the years to form the primary basis on which a violation of the Establishment Clause is determined. The coercion test has effectively established the absence of coercion as a threshold for any religious practice, observance or activity in the public sphere and has determined the parameters of the Establishment Clause. Consequently, any religious activity that has the reasonably foreseeable potential of causing some form of coercive pressure is regarded as unconstitutional. This is very similar to the approach adopted by the Canadian Supreme Court which, despite the absence of an establishment clause in the Canadian Charter, has interpreted the right to religious freedom to preclude both direct and indirect coercion.

3 2 Canada

As a legal comparative counterpart for South Africa few jurisdictions are quite as well situated as that of Canada. Not only have the Canadian courts dealt with many of the uncertainties around religious observances in the 1980s already, but a shared history of colonial rule and the substantial influence of the Charter on the formulation of section 15 of the Constitution create a worthy foundation for a comparative analysis. Both Canada and South Africa share a history of British imperial rule in which their legislation, policies, governments, and especially school systems were considerably influenced by Christianity.[118] Like the promulgation of the Constitution, the enactment of the Charter in 1982 heralded a new societal and legal order characterised by a supreme constitution that guarantees basic human rights and freedoms.

In terms of section 2(a) of the Charter everyone has the fundamental right of conscience and religion. The formulation of section 15 of the South African Constitution was substantially influenced by the right to religious freedom in the Charter.[119] Unlike the Constitution, however, section 2(a) of the Charter only provided for the right to religious freedom, making no mention of religious observances in state or state-aided institutions. The right to religious freedom is, as in South Africa, not an absolute right and may be limited. Section 1 guarantees all rights and freedoms in the Charter, subject "to such reasonable limits

[117] See section on Germany at 3 3.
[118] Dickinson & Van Vollenhoven "Religion in public schools: comparative images of Canada and South Africa" *Perspectives in Education* 1.
[119] Farlam "Freedom of religion, belief and opinion" in Woolman et al *CLOSA* 41-11.

prescribed by law as can be demonstrably justified in a free and democratic society." The Supreme Court of Canada in *R v Oakes*[120] established a test for applying section 1 that is remarkably similar to the limitations clause in section 36 of the Constitution.

Firstly, the law limiting the fundamental right must have a pressing and substantial objective. The second part of the test is a proportionality analysis that requires that a proportionate balance be struck between the infringement of the right and the legitimate government purpose. This entails that the limitation must be rationally connected to the objective; there must be as little impairment of the right as possible, and it must be proven that the same objective cannot be achieved in some other way which would result in a less intrusive infringement of the right.[121] The test also allows for a balancing of competing rights and policy considerations to determine if the limitation is reasonable and justifiable in a free and democratic society.[122]

In *Big M Drug Mart*, the first case to interpret section 2(a), the Supreme Court discusses the parameters of religious freedom as follows:

> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses; the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterised by the absence of coercion or constraint. Coercion not only includes such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices."[123]

The court here identifies the dual character of the right to religious freedom under the Charter. It entails the right to observe and participate in the religion of choice, as well as the right to be free from any direct or indirect compulsion in the making of this choice. The enactment of the Charter and the right to religious freedom had an inevitable impact on the way in which public schools conducted religious observances in Canada. In terms of the

[120] (1986) 1 SCR 103 ("*Oakes*").
[121] GM Dickinson & WR Dolmage "Education, religion, and the courts in Ontario" (1996) 21 *Canadian Journal of Education* 363 369.
[122] 368.
[123] *Big M Drug Mart* 336-7.

Constitution Act, 1867,[124] education is a provincial matter regulated by individual provincial acts.[125] The first cases dealing with religious observances were heard in the province of Ontario, but they have become a reflection of the national approach to religion in the Canadian school system.[126]

*Zylberberg v Sudbury (Board of Education)*[127] was the first case to deal with the constitutionality of religious observances in public schools. Section 28(1) of Regulation 262 (1980) under the Education Act (1980) required public schools to begin or end each school day with a reading of the Christian Lord's Prayer, scripture readings, and the singing of hymns.[128] Non-Christian and atheistic parents argued that section 28(1) violated section 2(a) of the Charter, regardless of the fact that attendance was free and voluntary. At the request of a parent(s), learners could be excused from the classroom during the observances, or if they remained in the classroom, they were not expected to participate. On the facts, none of the parents opted to have their children exempt from participation, because they feared their children would be singled out from their peers for their religious beliefs.[129]

The Board argued that the purpose of the law was to teach moral values, and that Christian religious values were simply used as a vehicle to achieve this objective.[130] Furthermore, they argued that if the law restricted section 2(a), the limitation of the rights of the religious minority was insubstantial and justifiable in an open and democratic society. Applying the *Oakes* test, the Ontario Court of Appeal found that section 28(1) constituted a *prima facie* infringement of the right to religious freedom.[131] On the question of whether this was a justifiable infringement, the court found that section 28(1) failed the proportionality element of the test. The court suggested that the denigration of minority rights was not insubstantial and did not impair "as little as possible" the right of the minority students.[132] It stressed the importance of "freedom from conformity"[133] and the fear that the practices of majority

[124] Section 93.
[125] Dickenson & Van Vollenhoven "Religion in public schools" *Perspectives in Education* 4.
[126] 4.
[127] (1988), 52 DLR (4th) 577 ("*Zylberberg*").
[128] Dickinson & Dolmage "Education, religion, and the courts in Ontario" *Canadian Journal of Education* 368.
[129] *Zylberberg* 575.
[130] 576.
[131] 585; Dickinson & Dolmage "Education, religion, and the courts in Ontario" *Canadian Journal of Education* 369.
[132] *Zylberberg* 585; Dickinson & Dolmage "Education, religion and the courts in Ontario" *Canadian Journal of Education* 369.
[133] *Zylberberg* 577.

religions are imposed on religious minorities, subjecting them to the "tyranny of the majority."[134]

The court found the argument that the Act served to teach moral values by way of Christianity unconvincing. Focussing on the last leg of the *Oakes*-test, the court held that there were less intrusive ways of imparting educational and moral values than those provided for in section 28(1).[135] It was not necessary to give primacy to the Christian religion in school opening exercises and these observances could be more appropriately founded on the multicultural traditions of the Canadian society.[136] The court out rightly rejected the argument that section 28(1) was constitutional because attendance was free and voluntary. While it sympathised with the majority standpoint, the court found that it did not reflect the reality of the situation faced by members of religious minorities.[137] Just like in American law, the question whether there is pressure or compulsion must be approached from the perspective of the minority and especially from the standpoint of learners in a sensitive setting like a public school.[138]

The court found that in reality the choice to participate in the observances or not, imposed on minorities a compulsion to conform to the religious practices of the majority.[139] The peer pressure and the classroom norms were pervasive and operated to compel religious minorities to conform to majoritarian practices.[140] This was illustrated by the fact that the applicants in this case were reluctant to request exemption from participation, fearing that their children may be ostracised or vilified.[141] In the court's view, children of school-going age are disinclined to step out of line or flout their "peer-group norms,"[142] subjecting them to a cruel dilemma. Learners could avoid claiming an exemption and simply continue participating in exercises distasteful to them because of a reluctance to be stigmatised as atheists or non-conformists.[143] Consequently, the exemption procedure was found to have the "chilling effect" of discouraging the free exercise of religion[144] and could not save section 28(1) from being declared unconstitutional. One of the arguments raised by the Board was that the Charter contained no establishment clause which meant that section 28(1) could not be

[134] *Big M Drug Mart* 354 in *Zylberberg* 577.
[135] *Zylberberg* 590.
[136] 590.
[137] 586.
[138] 586.
[139] 586.
[140] 587.
[141] 587.
[142] 587.
[143] *Schempp* 288 at *Zylberberg* 587.
[144] *Zylberberg* 592.

invalidated.[145] The court rejected this contention, drawing a distinction between the American Establishment Clause and the right to religious freedom in the Charter.[146] With reference to the decision in *Big M Drug Mart*,[147] the court found that the applicability of the Charter guarantee of freedom of religion does not depend on the presence or absence of an "anti-establishment principle."[148] While similar cases in America were decided under the Establishment Clause, the Canadian approach is centred on the right to religious freedom itself. Although these approaches overlap, the Canadian courts have opted to decide cases about religious observances by way of a balancing of competing rights and policy considerations.

Two years after the *Zylberberg* decision, the Ontario Court of Appeal was as again confronted with a case on religion in public schools, although the focus was on religious education rather than observances. In *Canadian Civil Liberties Association v Ontario (Minister of Education)*,[149] commonly referred to as *Elgin County*, the constitutionality of section 28(4) of Regulation 262 was questioned. Section 28(4) made provision for two periods of one-half hour each per week to be devoted to religious education in Ontario public schools. In practice, the content of these classes was primarily based on the Christian faith, but provision was made for exemption on the ground of conscience.[150] Attendance and participation in these classes were consequently free and voluntary. The Canadian Civil Liberties Association contended that this practice violated section 2(a) of the Charter, because it coerced children from minority religions to participate in religious education classes intended for members of the Christian faith.[151] They also argued that the exemption clause stigmatised learners who opted to make use of it.

In turn, the school board argued that religion was simply used as a vehicle for teaching moral lessons and Christianity was part of the curriculum, therefore the classes did not constitute indoctrination or coercion.[152] Furthermore, any infringement of religious freedom was trivial and in the light of the importance of the teaching of morality, it could be justified under section 1 of the Charter.[153] The court dismissed these arguments, finding that the purpose of the regulations was indoctrination and that they had the effect of pressurising

[145] 591.
[146] 591.
[147] 341.
[148] *Zylberberg* 591.
[149] (1990) 71 OR (2d) 341 ("*Elgin County*").
[150] Sections 28(10)–(15) of Regulation 262.
[151] *Elgin County*.
[152] *Elgin County*.
[153] *Elgin County*.

learners to conform to the religious practices and observances of Christianity. It found that the teaching of Christian doctrine as if it were the exclusive means through which to develop moral thinking amounted to religious coercion in the classroom.[154] With reference to *Edward Books*, the court reaffirmed the notion that all coercive burdens pose a threat to section 2(a) regardless of whether they are direct or indirect, intentional or unintentional, foreseeable or unforeseeable. [155]

In a sense, the decision in *Elgin County* was an inevitable consequence of the *Zylberberg* judgment and the very wide definition afforded to religious freedom in *Big M Drug Mart* and *Edwards*. As a result of these cases, the right to religious freedom comprises of the right to entertain the religious beliefs a person chooses and the right to be free from compulsion to conform to the religious practices of the majority.[156] The interpretation of indirect coercion in Canadian law is similar to that of the American courts. Even in the absence of an establishment clause, a wide meaning has been ascribed to indirect coercion, that includes the most subtle forms of compulsion. As a result, the right to religious freedom has acted almost exactly like the Establishment Clause in American jurisprudence.

Unlike the Constitution that makes specific provision for religious observances in public schools, the Charter is mute in this respect. In the absence of such a provision, the courts have interpreted religious freedom in much the same way as American courts have approached the Establishment Clause. In American law, indirect coercion violates the Establishment Clause, while in Canadian law indirect coercion violates the right to religious freedom. The approaches have similar outcomes, completely removing religious observances from the public sphere. Germany has a somewhat different take on religious observances in the public school system. German law provide for religious education while mitigating the potential coercive effect with rather strict rules as to the format and the content of the education and the accompanying observances.[157] Case law dealing with religious observances in public schools has opted for an alternative interpretation of indirect coercion that does not have the diminishing effect of judgments of the American and Canadian courts.

[154] *Elgin County*.
[155] *Elgin County*.
[156] Dickinson & Van Vollenhoven "Religion in public schools" *Perspectives in Education* 7.
[157] See Chapter 6 at 4 for a discussion of German religious education.

3 3 Germany

The German Basic Law (Grundgesetz) was drafted by the Parliamentary Council and promulgated in 1949.[158] The Parliamentary Council did not intend a strict separation between the state and the church and although these two entities are independent from each other, some religious communities are granted privileges which leads to cooperation between the state and the church.[159] As a result of this cooperative relationship, the Basic Law contains a more complex system of provisions related to the protection of religious rights. The central provision is found in section 4(1) which reads as follow: "Freedom of faith and of conscience, and freedom to profess religion or a particular philosophy, is inviolable." Section 4(2) adds that "the undisturbed practice of religion is guaranteed."

Furthermore, article 140 incorporates by reference five articles of the Weimar Constitution providing, among other things, that "there shall be no state church"[160] and that religious organisations shall enjoy the right to "regulate and administer [their] own affairs […] within the limits of the law that applies to everyone."[161] Protection is also afforded against the compulsion to disclose one's religious convictions[162] or to "perform any religious act or ceremony."[163] In addition, section 3(3) of the Basic Law states that "no one may be prejudiced or favoured because of […] his faith or his religious […] opinions."[164] From a legal comparative perspective, these are rather standard provisions, protecting the free exercise of religion while forbidding the establishment of an official state church. However, section 7(3) of the Basic Law creates an interesting provision related to religion in the public school system. It reads as follow:

> "Religious classes form part of the ordinary curriculum in state schools, except for secular schools. Without prejudice to the state's right of supervision, religious instruction is given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction."

[158] DP Currie *The Constitution of the Federal Republic of Germany* (1994) 10.
[159] T Maunz & R Zippelius *Deutsches Staatsrecht* (1998) 237.
[160] Article137(1) of the Weimar Constitution.
[161] Article 137(3) of the Weimar Constitution.
[162] Article 136(3) of the Weimar Constitution.
[163] Article 136(4) of the Weimar Constitution.
[164] For a full discussion on the nature and extent of religious protection in Germany, see Currie *The Constitution of the Federal Republic of Germany* 244-269.

In Germany, the legislative power to regulate the public school system is vested in the Länder, which are the equivalent of the American states or the South African provinces.[165] Their regulatory powers are only limited by section 7 of the Basic Law which, along with setting out the principles around religion in schools, also provides other guidelines by which the schools must be administered.[166] Germany allows for a variety of different schools. Firstly, section 7(3) excludes "non-denominational schools" from mandatory religious instruction. Non-denominational public schools are state schools that are neutral towards all religions.[167] They neither provide for religious instruction nor show any affiliation to a religion, although some schools do provide a general and neutral instruction in different religions and ideological beliefs.[168] These schools are, however, extremely rare in Germany and very few Länder have established their school system on a non-denominational basis.[169]

Secondly, there are public denominational schools where the education in all subjects is closely related to a particular religion.[170] As with the non-denominational schools, there are very few denominational schools in Germany. The majority of public schools in Germany fall within the third category, namely inter-denominational public schools.[171] These schools admit learners of all religious beliefs although the schools themselves are affiliated with Christianity and are constitutionally required to provide religious instruction.[172] In these schools, secular subjects may be taught with reference to Christianity as the main factor for cultural and educational development in Germany.[173] An example from this type of curriculum would be the effect that the development of the Lutheran-Protestant religion had on Germany's social development.[174]

The emphasis is more on the Christian tradition and culture than the Christian faith and the purpose is educational rather than confessional.[175] Consequently, proselytising learners towards Christianity or influencing them to believe in a certain religion is prohibited.[176] The

[165] Meuelhoff "Freedom of religion in public schools in Germany and the United States" *Georgian Journal of International and Comparative Law* 455.
[166] 455.
[167] 456; J Waltman "Communities in conflict: the school prayer in West Germany, the United States and Canada" (1991) 27 *Canadian Journal of Law and Society* 26 31.
[168] Meuelhoff "Freedom of religion in public schools in Germany and the United States" *Georgian Journal of International and Comparative Law* 456.
[169] 456.
[170] 456.
[171] 456.
[172] 456; Waltman "Communities in conflict" *Canadian Journal of Law and Society* 31.
[173] Meuelhoff "Freedom of religion in public schools in Germany and the United States" *Georgian Journal of Comparative Law* 456.
[174] 456.
[175] Currie *Constitution of the Federal Republic of Germany* 249.
[176] Meuelhoff "Freedom of religion in public schools in Germany and the United States" *Georgian Journal*

schools may thus not convert to missionary schools[177] and may not demand a commitment to Christian beliefs and values.[178] A distinction must be drawn between religious observances, which are not expressly provided for in the German Basic Law and religious instruction which is enshrined in section 7(3) of the Basic Law. Importantly, religious instruction in German schools is not only presented in accordance with the Christian faith, but provision is also made for instruction in other faiths, provided that there are enough students to form a class.[179] The cost of this is carried by the state and the right to receive religious instruction does not mandate that children be instructed contrary to their own beliefs.[180]

As can be expected, some inter-denominational schools also provide for religious observances usually in line with the Christian faith, although attendance is free and voluntary. The constitutionality of these practices was first addressed in 1979. In the so-called "School prayer case,"[181] a father of children in an inter-denominational school challenged the constitutionality of a practice to start every school day with an inter-denominational prayer that was recited by teachers and learners. He argued that this was a violation of the right to religious freedom as his children experienced pressure to participate in the observances, although they may be exempt from attendance. Unlike the American court that decided the question under the Establishment Clause, the German Constitutional Court elected to find a neutral solution by balancing competing rights against each other.[182]

The court began by noting that both the parents' right to inculcate their own values in their children and the power of the state to operate school systems are constitutionally established.[183] It then differentiated between religious instruction and religious observances with the latter not necessarily guaranteed by the Constitution. According to the court, religious freedom has two components which are equally protected and restricted – the freedom not to have any religious belief and not to practice religion[184] has the same protection as the freedom to believe and practise religion.[185] The right not to be religious may, however, not prevent or violate the freedom of those that are religious.

---

*of Comparative Law* 456.
[177] Currie *Constitution of the Federal Republic of Germany* 253.
[178] Meuelhoff "Freedom of religion in public schools in Germany and the United States" *Georgian Journal of Comparative Law* 457.
[179] 458; German religious instruction is discussed more fully in Chapter 6.
[180] 458.
[181] *52 BVerfGE* 223 (1979) ("*School prayer case*").
[182] *52 BVerfBE* 223.
[183] English translation of *52 BVerfGE* 223 in D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 466-72.
[184] This is called the negative character of religious freedom.
[185] *52 BVerfGE* 224. This is called the positive character of religious freedom.

The court proceeded to balance the competing rights in an attempt to find an acceptable place for both. It stated that the complaining parents' desire to have their children educated in a secular environment, free from religious influences, conflicted with the wishes of other parents to provide their children with a Christian upbringing.[186] Firstly, the court felt that the elimination of all traces of religious thinking from the schoolroom would not be neutral with respect to religion. Secondly, parents who preferred a religious education for their children would be disadvantaged. Thirdly, the court held that the resolution of competing claims to religious liberty was entrusted to the democratic process and that, so long as public schools did not become missionary schools or attempt to preach the infallibility of Christian beliefs, a curricular affirmation of Christianity, more cultural than confessional, infringed no one's religious freedom.[187]

The court found that it would be possible for those pupils who did not wish to be a part of the religious observance to leave the classroom and avoid an encounter with religion. Alternatively, they could remain in the class and keep silent and not participate in the prayer. The possibility of a learner experiencing subtle social pressure to participate was not regarded as so crucial as to render the practice unconstitutional. The court did not dismiss the possibility of coercion out of hand, but rather found that this risk was reasonably outweighed by the rights of other learners to pray. Article 4 guarantees both the right to be religious and to express that belief in public. The authorisation of school prayer was merely a way of affording learners the opportunity to do so, and when balanced against the competing interest, the risk of embarrassment to a learner wishing to excuse himself is not excessive.[188] The court felt that the likeliness of this occurring was minimal since the prayer was only held at the beginning of the day.[189]

Furthermore, the teacher could explain to the class the reason why the learner is not participating in the prayer and that his behaviour must not be considered "strange."[190] The court also felt that the adverse consequences a learner may experience for electing not to participate were similar to the consequences for not participating in religious instruction. In the latter case the Basic Law makes specific provision for such non-participation and in a society that has become increasingly diverse, it is no longer strange for learners to excuse

[186] *52 BVerfGE* 224.
[187] 230.
[188] *52 BVerfGE* 248-53.
[189] 249.
[190] 251.

themselves as the number of conscientious objectors has increased considerably.[191] Therefore, it was unlikely that only one learner would be placed in an outsider position. The court recognised that there may be rare cases where the religious observance could unfairly burden the learner – for example, if the student is emotionally weak or the teacher is unable to successfully explain and mediate the situation in the class.[192] The court held that in these instances it may be necessary to prohibit school prayer in order to protect the right of the learner to be free from religious pressure.[193]

The German approach to school prayer contrasts sharply with the approach adopted by courts in America and Canada. In Germany the general feeling seems to be that a policy of equal respect and concern for the religious values of each learner in the educational context requires not the suppression of a devotional exercise reflecting those values, but rather tolerance in the face of such expression, particularly when it is performed voluntarily and outside the sphere of the teaching curriculum.[194] It is clear that directly coercing a learner to participate is unconstitutional, but, unlike the American and Canadian courts, Germany does not consider indirect coercion to be fatal to religious observances. The right of individuals to practise and manifest their religion in public is considered more important than the possible pressure a non-adhering learner might experience when confronted with a choice to participate or not.

It is an approach that is premised on a mutual tolerance of others' beliefs with the non-adherent respecting the right of his fellow learners to profess their religion in public, and the religious learners respecting the non-adherent's decision to refrain from such an exercise. The effect of the coercion is also mitigated by the fact that learners receive instruction in accordance with their religious beliefs. In these classes they are allowed to associate with other learners of their own religions and given an opportunity to celebrate and observe their own religion. It is now necessary to determine the approach envisioned by the South African Constitution in view of the contrasting approaches followed in these jurisdictions.

## 4 Understanding "free and voluntary" under the South African Constitution

The point of departure in interpreting "free and voluntary" must be the text of the Constitution itself. As has been mentioned repeatedly, section 15(2) of the Constitution

[191] 252.
[192] 253.
[193] 253.
[194] Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 461.

makes provision for religious observances in state and state-aided institutions. Du Plessis,[195] Smith,[196] Currie and De Waal[197] and Devenish[198] agree that the point of departure must be that section 15(2), read with section 7 of the Schools Act, expressly provides for religious observances in public schools. Religious observances are thus consistent with the Constitution, as long as attendance is voluntary for both teachers and learners.[199]

From the outset it is clear that any form of direct coercion would constitute an automatic infringement of religious freedom as it would render the observance neither free nor voluntary. It would thus be unconstitutional if non-adhering learners or teachers were met with some penalty for their refusal to partake in a school prayer or listen to a sermon of someone from a different faith. Schools are also prohibited from providing some form of incentive for participating learners. Examples could include rules only allowing Christian learners to be elected to the student representative body, or a system of evaluation whereby students are awarded marks in certain subjects for their participation in religious observances. This is similar to the approach adopted in the American case of *Kerr v Ferray*, where a system which allowed prisoners to obtain parole for attending Christian-based narcotics meetings was found to be unconstitutional.

The Constitutional Court in *Lawrence*[200] has, however, alluded to a broader reading of section 15(2). Chaskalson P states that "voluntary school prayer could also amount to coercion of pupils to participate in the prayers of the favoured religion."[201] O'Regan J also holds that "religious beliefs are a matter of personal faith and commitment which should not be the subject of coercion, whether direct or indirect."[202] She does, however, concede that observances can be allowed, but in absolutely equitable circumstances so as to diminish their coercive effect. Sachs J on the other hand approaches the question of coercion much like the American courts. He rejects Chaskalson P's finding that coercion must be established before an act by the state is unconstitutional, stating that "[e]ven if there is no compulsory requirement to observe or not to observe a particular religious practice, the effect is to divide the nation into insiders who belong, and outsiders who are tolerated."[203]

---

[195] "Religion, law and the state in South Africa" *European Journal for State and Church Research* 233.
[196] "Freedom of religion under the Final Constitution" *The South African Law Journal* 220.
[197] *The Bill of Rights Handbook* 330.
[198] *The South African Constitution* 72.
[199] Smith "Freedom of religion under the Final Constitution" *SALJ* 220.
[200] Para 103.
[201] Para 103.
[202] Para 129.
[203] Para 179.

Sachs J's interpretation illustrates the difficulty in discerning the meaning and scope of "free and voluntary". It is respectfully submitted that his approach wrongly ignores the wording of the Constitution, by following an "establishment approach" within a context where no clear separation between the state and religion was envisioned. If section 15(2) is to be a functional part of the Constitution, a certain degree of endorsement will have to be tolerated otherwise it will negate the section in its entirety. The same must be said for indirect coercion. While there is general consensus that "free and voluntary" must exclude the danger of both direct and indirect coercion, it is clear that an approach similar to that of America and Canada would render section 15(2) nugatory.[204] A too wide interpretation of indirect coercion that includes all potential forms of subtle pressure will ultimately result in a blanket ban on all religious observances in public schools. This was not the intention of the constitutional drafters, nor is it an interpretation that is reconcilable with the wording of section 15(2).

Section 15(2) sets the difficult task of structuring observances in such a way that they are formally free and voluntary, while at the same time ensuring that subtle coercion does not negate their voluntariness.[205] Mureinik[206] concedes that it is seldom easy to structure a religious observance at a state or state-aided institution to meet this requirement. The comparative jurisdictions illustrate this difficulty, with most claimants arguing that, regardless of exemption procedures, the fear of being ostracised or vilified for their dissenting beliefs was a disincentive for seeking exemption from participation. Especially in the American and Canadian cases, the impact of peer pressure, the need to conform and the impressionableness of young children were recurring narratives that convinced the courts that religious observances had no place in public schools. These concerns are equally pressing in the South African context with its history of religious compulsion in schools and the constitutionally protected rights to religious freedom, human dignity, equality and the need to provide in the best interest of the child. This must, however, be weighed against the wording of section 15(2).

It is therefore submitted that an approach somewhere between that of the German Constitutional Court and the American/Canadian courts would be the most appropriate way of balancing these competing rights and policy considerations in South Africa. A certain degree of compulsion will have to be tolerated by dissenting learners, parents and teachers.

---

[204] Farlam "Freedom of religion, belief and opinion" in Woolman *CLOSA* 41-52.
[205] Smith "Freedom of religion under the final Constitution" *SALJ* 221.
[206] Mureinik "A bridge to where? Introducing the Interim Bill of Rights" *SAJHR* 46.

If section 15(2) is to be a functional part of the Constitution, a certain measure of indirect coercion will be inevitable as religious observances can never be conducted to completely eliminate all forms of coercion. An approach as sensitive as that of the American and Canadian courts cannot be sustained, while there is definitely space for a more sensitive approach than that of the German court's interpretation of coercion. The German court acknowledges the existence of indirect coercion, but seems to suggest that a learner must just make use of the exemption procedure while teachers can explain the reason for the learner's non-adherence to the class.[207] Taking into account the right to dignity and its link to religious freedom, the right to religious freedom itself, religious equality and the best interest of the child, it would probably be best if observances and exemption procedures are structured in such a way as to draw the least bit of attention to the dissenting learners.

In Germany the effect of this compulsion is however somewhat mitigated by affording all religions an equitable place in the school system. Despite the fact that religious observances are allowed in German schools, there are rather strict rules concerning the accommodation of non-adhering learners. In various Länder there are rules that make provision for religious education and observances when a minimum number of dissenting students have been reached.[208] In Lower Saxony for example a number of 12 learners from the same religion/confession are needed for the school to be obliged to establish religious education and the accompanying observances in accordance with that religion.[209] In Bavaria, the state pays for the rabbi or minister to teach the children separately, even when the minimum number of students has not been reached.[210]

In South Africa, the impact of coercion must also be mitigated. This can be done in a variety of ways. Firstly, the time and the place of religious observances must be chosen in such a way as to ensure that learners experience the least amount of pressure. Conducting a prayer during a graduation ceremony, as in the *Lee* case, or during a prize giving ceremony will increase the coercive burden on learners, teachers and parents who will, in exercising their right to be free from religious observances, be required to draw a lot of attention to themselves. Leaving the ceremony area or only entering after the prayer can be embarrassing and difficult, especially in the case of young children. If a prayer or reading scripts from the

[207] This somewhat harsh approach can possibly be ascribed to the fact that provision is normally made for non-adhering learners in Germany and a child that feels overtly coerced is usually an exception.
[208] T Jensen & K Kjeldsen "Baseline Study: Religious education in Germany" (2014) *Intercultural Education Through Religious Studies* < http://iers.unive.it/files/2014/03/Baseline_Study-RE-in Germany.pdf> (accessed 08-07-2015) 7.
[209] 7.
[210] 7.

Bible is allowed in class, it would be best to allow for this during the first administrative period of the day. Expecting a learner to leave the classroom in front of all of his peers would place a large amount of pressure on him to simply conform to the norm. By allowing for observances at the beginning of the day, the child can come to school a bit later and join the class when classes are being swapped and his appearance in class is as inconspicuous as possible.

Keeping the effect of indirect coercion to a minimum will require sensitivity on the side of the teachers, learners, parents and school community. There is an obligation on the majority to respect the religious differences of non-adherents. This means that their right to practise religious observances in the public sphere will be somewhat inhibited. For example, when a rugby match is played and one of the players is Muslim, it would arguably not be appropriate to have one of the Christian players pray for the team's success. It would be more appropriate to allow for a moment of silence where each player can observe in accordance with his own religion. In *Wallace*, O'Connor J suggests that this practice would not infringe religious freedom as there is no coercive pressure to conform to a particular religion. Should the entire team, however, be Christian, it would be permissible to allow one player to pray out loud.

There is no blanket rule that can be applied in all circumstances and the approach followed in each school will depend on a wide variety of factors that are context specific. Indirect coercion cannot be eliminated completely, but it can be managed to mitigate its effect. The aim should be to foster an environment where religious dissenters are not vilified for their beliefs, but tolerated and even celebrated. One way of achieving this is to allow for religious observances to be conducted on an equitable basis. The correct interpretation of "equitable basis" has never been addressed in South African case law. Just like "free and voluntary", it will have to be construed in the light of section 7 of the Schools Act and the Constitution. The next chapter will flesh out such an approach with reference to the rights and policy considerations that will interplay in deciding on the appropriate model of "equitable basis."

## 5 Conclusion

The effects of indirect religious coercion can be just as damaging as direct coercion. It labels learners as "different" which results in them being ostracised and vilified for their divergent beliefs. It is for this reason that religious observances must be structured in such a way as to ensure the least amount of coercive pressure on non-adhering learners or learners of minority religions. Children are especially vulnerable to religious coercion and may find it difficult to voice their beliefs in the face of a religiously homogenous majority. When

drafting rules on observances, governing bodies must always attempt to structure them in the least intrusive way and allow for learners to refrain from participation without drawing attention. They must always be aware of the potential impact their rules might have on learners and find practical ways to ensure that learners are not subjected to a situation where they are uncomfortable or judged for holding a different religious belief.

In a religiously diverse society, it is inevitable that learners will on occasion feel pressured into participation, or experience adversity for not adhering to the norm. As South Africa's democracy develops and the constitutional right to religious freedom becomes more entrenched in society, the focus must shift to ensuring that religious differences become a source for celebration, rather than being seen as something that must only be tolerated. Until then, the only way to mitigate the impact of religious coercion in public schools is to ensure that religions are treated, as far as reasonably possible, on an equitable basis.

# CHAPTER 6
# EQUITABLE BASIS

## 1 Introduction

Section 15(2)(b) of the Constitution and section 7 of the Schools Act require religious observances to be conducted on an equitable basis. The appropriate interpretation of "equitable basis" in the context of religious observances has never been at the centre of any South African case law. Section 15(2)(b) was addressed *obiter* in the *Lawrence* case but, as will be shown in this chapter, there was no unanimity amongst the judges on the desired interpretation of this requirement. Construing an appropriate meaning for equitable basis is imperative for understanding the constitutional approach to religious observances in public schools. The purpose of this Chapter is to develop an interpretation of "equitable basis" that is compatible with the right to religious freedom and the supporting rights in the Constitution. This interpretation must be read together with the voluntariness requirement and must take cognisance of South Africa's constitutional and social context.

It is submitted that section 7 of the Schools Act, read with section 15(2)(b), calls for a rather generous interpretation as the equity requirement has the potential of addressing and mitigating the negative effects of religious coercion in the school context. While it is true that learners cannot be completely free of indirect religious coercion, the way in which schools accommodate the diversity of learners' religious convictions can reduce the harmful effects of the coercion. This means that religious observances in public schools must be conducted in a way that ensures the equitable treatment of both majority and minority religions with schools taking active steps to accommodate the beliefs of a religiously diverse pupil body. What will qualify as equitable will be context specific and will be influenced by a number of considerations. It is however submitted that, in order to ensure that the negative impact of coercion on non-adhering learners is properly addressed, a high standard of equity is required. In this context the German approach to religious instruction is particularly helpful as it has succeeded in creating a structure that is fair and equitable to adherents of both majority and minority religions.

This chapter will suggest an interpretation of equity that, together with voluntariness, will ensure that religious observances are conducted in a non-coercive manner that allows adherents an equitable opportunity to partake in religious observances associated with their faith. Firstly, the term "equitable" will be defined. The South African case law on section 15(2)(b) will then be analysed with a focus on the conflicting approaches of the judges and

the implications of each interpretation. Thirdly, the focus will fall on the German model of religious instruction as an example of how religions may be treated equitably in the school system. Lastly, a model will be proposed for understanding equitable basis in the Constitution, focussing on the steps that schools can take to accommodate religious diversity.

## 2 Defining "equitable"

The Collins English Dictionary[1] defines "equity" as the "quality of being impartial" or as "fairness." "Equitable" is defined as "fair and reasonable."[2] It is important to note that equity is not the same as equality: while the two concepts are related, equity should not be read as requiring the absolute equal treatment of all religions.[3] Section 7 and section 15(2)(b) require "equitableness" which is a weaker standard than equality.[4] This requirement rather envisions the treatment of different religious observances in a way that is fair, just[5] and reasonable, taking into account the particular circumstances of every school. Practically, equity sometimes requires that one religion be treated differently from another in order to achieve fairness.[6] It can even result in one religion being afforded preferential treatment if it will result in the reasonable and fair treatment of that religion in the circumstances.

Equity is an ethical imperative, associated with principles of social justice and human rights.[7] What is equitable in a particular situation will depend on the facts and the context of the matter,[8] as well as the human rights that are affected. The *Lawrence* judgment is the only case that has dealt with the interpretation of "equitable basis" in section 15(2)(b). Unfortunately, the court only discussed this requirement *obiter* and since the court was not unanimous in its interpretation, there is no absolute certainty on the meaning that must be afforded to equitableness in the context of religious observances in public schools. The next section will analyse the manner in which the court dealt with section 15(2)(b) and the differences in approach by the justices.

---

[1] J Crozier, A Grandinson, C McKeown, E Summers, P Weber (eds) *Collins English Dictionary* (2005) 265.
[2] 265.
[3] Farlam "Freedom of religion, belief and opinion" in Woolman et al *CLOSA* 41-51.
[4] P Farlam "The ambit of the right to freedom of religion: A comment on *S v Solberg*" (1998) *South African Journal of Human Rights* 298 324; E Mureinik "Let's Privatise God" *Mail and Guardian* (01-11-1995); W Freedman "Understanding the freedom of religion clause in the South African Constitution Bill, 1996" (1996) 1 *Human Rights and Constitutional Law Journal of Southern Africa* 35 36.
[5] Farlam "Freedom of religion, belief and opinion" in Woolman et al *CLOSA* 41-51.
[6] EFJ Malherbe "Die grondwetlike beskerming van godsdiensvryheid" (2008) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 673 696.
[7] E Gomez "Equity, Gender and Health: Myths and Realities" (2004) *Women's Health Journal* 50 54.
[8] A Facio & MI Morgan "Equity or Equality for Women? Understanding CEDAW's Equality Principles" (2009) 60 *Alabama Law Review* 1133 1141.

## 3 "Equitable basis" in South African case law

The *Lawrence* judgment centred on the interpretation of section 14(1) of the interim Constitution and the remarks made by the court on the interpretation of section 14(2), which is similar to section 15(2) in the final Constitution, are merely *obiter*. It is, however, an indication of the way in which the court envisions the interpretation of the requirements for religious observances in public schools. Chaskalson P in *Lawrence*, states the following with reference to section 15(2):

> "Compulsory attendance at school prayers would infringe freedom of religion. In the context of the school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion. To guard against this, and at the same time to permit school prayers, section 14(2) makes it clear that there should be no coercion. It is in this context that it requires the regulation of school prayers to be carried out on an equitable basis."[9]

From the above it is clear that there is a symbiotic relationship between the requirement of voluntariness and the requirement of equity. Chaskalson P seems to suggest that conducting religious observances on an equitable basis may have the effect of reducing the coercive burden on adherents of minority religions or non-believers. Providing for religious observances of the minority religions is likely to mitigate the negative psychological impact that the majority religion may have on the minority. Chaskalson P goes on to discuss the nature of the equity requirement:

> "I doubt whether this means that a school must make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to me to require education authorities to allow schools to offer the prayers that may be most appropriate for a particular school, to have that decision taken in an equitable manner applicable to all schools, and to oblige them to do so in a way which does not give rise to indirect coercion of the 'non-believers'."[10]

Chaskalson P makes the observation that "equitable basis" does not require the school to make provision for religious observances for as many denominations as may be present within the school community.[11] This statement is somewhat problematic as it does not address the extent of schools' obligation to ensure that religious observances comply with the equity requirement. Chaskalson P's argument suggests that it would be sufficient if religious

[9] *Lawrence* para 103.
[10] *Lawrence* para 103.
[11] *Lawrence* para 103.

observances are conducted in accordance with the beliefs of the majority of the school community. His approach does not make provision for the needs of minority religions in the school and does not suggest an alternative for those who do not adhere to the religion of the majority. It will not suffice for a governing body to present religious observances based purely on what the majority of the school community wants without attempting to accommodate those who do not adhere to the majority religion. This would allow the majority to ignore the religious needs of the minority,[12] which falls short of the equity standard envisioned by section 15(2)(b).

Such an approach also ignores one of the fundamental purposes of the Bill of Rights, namely the protection and advancement of minority rights.[13] The Constitution, and especially the Bill of Rights, aims to mitigate the effect of majoritarian democracy by affording basic human rights to all, regardless of their religious convictions. Religious freedom therefore extends to the minority as well and is not only aimed at advancing the religious beliefs of the majority. The underlying principle of minority protection makes Chaskalson P's interpretation of "equitable basis" problematic. This approach also has an unduly coercive impact on members of the minority religions as they will have no other choice but to adhere, or be branded as non-believers. It is especially problematic in light of the importance of religious freedom and the best interest of the child.

As discussed in Chapter 5, children are susceptible to peer pressure and can easily fall victim to religious coercion. To suggest that religious observances should be presented in accordance with the beliefs of the majority while ignoring the needs of the minority increases the pressure on learners to conform to the majority religion. This will not only infringe on the equitableness requirement in section 15(2), but also violate the voluntariness requirement. Furthermore, this approach infringes the supporting rights such as the dignity, equality and religious freedom of religious minorities.

O'Regan J also comments on the nature of section 15(2) and states the following:

> "The stipulation of voluntariness is not the only precondition established by section 14(2). The subsection also requires that even where attendance is voluntary, the observance of such practice must still be equitable. In my view, this additional requirement of fairness or equity reflects an important component of the concept of freedom of religion contained in our Constitution. Our society possesses a

[12] Smith "Freedom of religion under the final Constitution" *SALJ* 221.
[13] 221.

> rich and diverse range of religions. Although the state is permitted to allow religious observances, it is not allowed to act inequitably.[14]
>
> In determining what is meant by inequity in this context, it must be remembered that the question of voluntary participation is a consideration separately identified in section 14(2). The requirement of equity must therefore be something in addition to the requirement of voluntariness. It seems to me that, at the least, the requirement of equity demands the state to act even-handedly in relation to different religions."[15]

She goes on to state that:

> "Requiring that the government act even-handedly does not demand a commitment to a scrupulous secularism, or a commitment to complete neutrality. Indeed, at times giving full protection to freedom of religion will require specific provisions to protect the adherents of a particular religion as has been recognised in both Canada and the United States of America. For example, in the context of religious observances at local schools, the requirement of equity may dictate that the religious observances held should reflect, if possible, the religious beliefs of that particular community or group. But for religious observances at national level, however, the effect of the requirement is to demand that such observances should not favour one religion to the exclusion of others."[16]

Similar to Chaskalson P, O'Regan J identifies the equitable treatment of religions as a requirement distinct from voluntariness. For her, the even-handed treatment of religions forms the crux of the equity requirement. She argues that "equity" does not require absolute neutrality towards religion or a commitment to "scrupulous secularism,"[17] but rather an attempt by the state to treat different religions in a similar manner. O'Regan J recognises that equity and equality are not synonyms, stating that at times the full protection of religious freedom will require that specific steps be taken to protect the adherents of a particular religion.[18] It would thus not violate the constitutional right to religious freedom if some religions are treated differently, as long as the differentiation does not constitute inequitable treatment. Du Plessis[19] refers to this as "proactive tolerance", which means that the state can, without enjoining it, actively acknowledge religious sentiments and practices. A school would thus be able to equitably advance, accommodate and safeguard religious observances

[14] *Lawrence* para 121.
[15] Para 122.
[16] Para 122.
[17] Para 122.
[18] Para 122.
[19] "Freedom of or freedom from religion?" *Brigham Young University Law Review* 458.

in schools without being accused of bias towards a particular religion or of advancing a particular religious agenda.[20]

O'Regan J attempts to interpret the equity requirement in the South African school context by suggesting that equity may dictate that the religious observances held should reflect, if possible, the religious beliefs of that particular community or group.[21] The intention is thus not that each and every religion, no matter how big or small its following, must be equally represented at the school level. It would be irrational to present religious observances in accordance with the Muslim faith if there are no Muslim learners in the school. What is rather required is that religious observances reflect the religious composition of the particular school community.

It is not clear what the practical implications would be of O'Regan J's suggested approach. When she says that the religious observances should reflect the religious beliefs of the group, it is not clear whether she is referring to the religion of the majority of the group, or the religious observances of every single individual within the group. If she is referring to the larger school community, it can surely not be assumed that the entire community will adhere to a single religion and that religious observances will be conducted solely in accordance with that particular religion. If that is the case, her reasoning would be subject to the same criticism as Chaskalson P's judgment.

Alternatively, "community or group" could refer to the religious convictions of every individual that forms part of the community or group. The community is thus viewed as a compilation of religiously diverse individuals that require religious observances to be conducted in accordance with all the different represented religions. On this interpretation, the nature of the religious observances will not be determined by the majority, simply because they outnumber the minority. The community or group would refer to every individual member of the group and the diversity of religions represented within the group. This interpretation allows for religious observances to be conducted in an even-handed manner with the religious convictions of the minority not negated in favour of the majority.[22] It is an approach that takes cognisance of the needs of all the members of the school community and creates an environment that promotes religious equity.

When considering O'Regan J's judgment as a whole it seems appropriate that the latter understanding of "equitable" should prevail. In *Lawrence* she found that the purpose of

[20] 458.
[21] *Lawrence* para 122.
[22] Para 122; M Pieterse "Many sides to the coin: the constitutional protection of religious rights" (2001) *XXXIII CILSA* 300 306.

selecting Sundays, Christmas Day and Good Friday as closed days was not secular.[23] Even if not intentional, the inevitable effect of choosing these days was to give a legislative endorsement to Christianity.[24] She agreed with Chaskalson P that the state should not coerce, but added the important requirement that the state must act fairly and equitably in dealing with diverse religions in South Africa. O'Regan J also denounced the explicit endorsement by the state of one religion over another as this could threaten the free exercise of religion in a society with a diversity of religions.[25] She argued that when the power and prestige of the state is placed behind a particular religion it could result in undue coercive pressure on religious minorities to conform to the prevailing religion.[26]

In light of O'Regan J's conclusion in *Lawrence,* and the addition of an equitableness inquiry into the right to religious freedom, she most likely intended "group or community" to refer to the individuals and the religions they represent. She has a more expansive and nuanced understanding of religious freedom than Chaskalson P and suggests an approach that pays close attention to the needs of minority religions. In terms of her approach religious observances must be arranged in such a way that both majority and minority religions are treated even-handedly and provided with equitable opportunities and resources to partake in observances of their choice.

Similar to the requirement of indirect coercion discussed in Chapter 5, some foreign jurisdictions have also grappled with the fair and equitable treatment of different religions. Especially in Germany, where religious education is constitutionally permissible, there has been a concerted effort by the state to ensure that religions are treated as fairly and as equitably as can reasonably be expected. What follows is a discussion of the German model of religious education. There is a distinction between religious observances and religious education, and the South African Constitution only allows for the former and not the latter.[27] The purpose of this comparative analysis is not to suggest that religious observances in South African schools must be conducted in the formal and institutionalised manner religious education is treated in Germany. The purpose is to analyse the German system of religious education to understand how it has managed to balance the needs of the different religious

[23] *Lawrence* para 123.
[24] Para 127.
[25] Para 123.
[26] Para 123.
[27] Currie & De Waal *The Bill of Rights Handbook* 332. The Constitutional Court in *Ex pare Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) rejected the argument that the state is compelled to provide educational institutions based on commonality of culture, language and religion.

communities in an equitable manner. This will shed light on the South African approach to the equitable treatment of religions and religious observances in the public school system.

## 4 Equitable basis from a legal comparative perspective

### 4 1 Germany

Article 7(2) of the German Basic Law states that "[p]arents and guardians shall have the right to decide whether children shall receive religious instruction." Furthermore, Article 7(3) makes specific provision for religious instruction in state schools stating that "[r]eligious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned." Learners thus have the right to be taught according to the faith of their own religious community or denomination.[28]

Article 7 applies to all public schools in all Länder (that is the various states comprising the German federation) and there is an obligation on the Länder, within their own legal systems, to ensure that statutes establish close cooperation between the state and religion in regard to the provision of confessional religious education in state schools.[29] Religious education is offered as a school subject in public schools in Germany and is supported by the state.[30] The German federal state provides funding for the teaching of religious education[31] and the Länder are empowered to make rules and regulations on the way in which religious education is conducted. The Länder do not, however, constitute the sole authority over the education of religious learners.[32] They are rather assisted by established religious communities and the education of religious learners in public schools is conducted through joint governance.[33] This joint relationship is constitutionally entrenched and places an obligation on both the state and religious communities to take positive steps to realise the right of learners to receive a religious education and to partake in religious activities within the public sphere.

---

[28] G Adam *Basics of Religious Education* (2014) 148.
[29] Jensen T & Kjeldsen K "Baseline Study: Religious education in Germany" (2014) Intercultural Education Through Religious Studies <http://iers.unive.it/files/2014/03/Baseline_Study-RE-in-Germany.pdf> (accessed 01-10-2015) 5.
[30] 6.
[31] 6.
[32] A Shachar *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001) 156.
[33] 156.

The state can enter into a cooperative relationship with a religious association or a religious community if that association or community meets certain requirements.[34] The first requirement is that the community must be able to show some form of permanency that is usually proven by the existence of a constitution or a sufficient number of members.[35] Secondly, the state requires that clear membership rosters be presented in order to determine which pupils are entitled to attend religious instruction.[36] Thirdly, the community must have a representative who can define the religious principles and represent them to the learners.[37] Lastly, the religious community may not be subject to influence by state institutions, either in Germany or abroad.[38] It is often difficult for religious communities to meet these requirements. As a matter of practicality it is however important that these requirements be met as it ensures that the quality of religious instruction is sufficient and has a prospect of longevity.

The state does not assign learners to religious instruction classes and is not in control of the curricular content of these classes.[39] Religious instruction is usually presented by a member of the relevant faith who, ideally, has to be a regular member of the public school faculty.[40] Teachers teaching confessional religious education are trained primarily at relevant theological university departments and must be formally approved by the religious society of the religion they wish to teach.[41] Classes are usually presented for about three hours a week and the learners are split into different venues together with fellow adherents. Twelve of the sixteen Länder have Protestant and Catholic Religious Education while Christian Orthodox Religious Education is presented in some places in Baden-Wuerttemberg, Bavaria, Hesse and North Rhine-Westphalia.[42] Jewish Religious Education is also presented in some Länder while New Apostolic instruction is available in Bavaria.[43] Mennonite instruction is presented in Hesse, Old Catholic instruction in Baden-Wuerttemberg and Buddhist and humanistic education is available in Berlin.[44]

---

[34] J Berglund "Publically funded Islamic education in Europe and the United States" *The Brookings Project on US Relations with the Islamic World* (2015) 21 Analysis Paper 16.
[35] 16.
[36] 16.
[37] 16.
[38] 16.
[39] Shachar *Multicultural Jurisdictions* 156.
[40] 156.
[41] Jensen & Kieldsen *Baseline Study* 6.
[42] Adam *Basics of Religious Education* 148.
[43] 148.
[44] 148.

Registered religious communities are allowed to present religious instruction in public schools as long as there are a certain number of adherents per grade.[45] Each of the Länder requires a different number of adherents.[46] In Bavaria and Saarland five learners per school is required to present religious education in accordance with their religion.[47] This number increases to eight in Hesse and eleven in Lower-Saxony.[48] State funding is equitably divided amongst the different religions depending on the number of learners, teachers and the nature of the religious education.[49] The Länder are however allowed to make exceptions to accommodate minorities. For example, in Bavaria the state has on occasion agreed to pay a rabbi or a minister to teach learners privately in a synagogue or a church.[50] In these instances the minimum number of learners was not required as the need to accommodate these learners was more important than the need to follow formalistic rules.

Confessional religious education is however not mandatory in Germany and learners and parents are provided with the option of opting out if they are not religious or simply do not want to partake in religious education. The Länder all offer an alternative to religious education. This subject is usually called "Ethik" (Ethics), "Ethikunterricht" (Ethics Education), "Werte und Normen" (Values and Norms) or "Philosophy".[51] The subject combines Philosophy, Social Science and the Study of Religion. Religion is thus not taught from a confessional perspective, but rather entails the historical and philosophical study of different religions.[52] Parents are free to decide whether or not their children will participate in confessional religious education or be instructed in secular Ethics/Philosophy.[53]

After the age of fourteen, children can decide for themselves whether they want to participate in the confessional religious education, and if so, decide on the religion of their choice. They are also allowed to opt out completely and make use of the secular option. Bavaria has even gone as far as to allow learners, upon turning fourteen, to opt in or out of religious education. Learners can elect to do so at any time after they turn fourteen. They then have to pass an exam on the work they were taught in religious education or the secular

[45] 148.
[46] AB Seligman *Religious Education and the Challenge of Pluralism* (2014) 10.
[47] Adam *Basics of Religious Education* 148.
[48] 148.
[49] Shachar *Multicultural Jurisdictions* 156.
[50] Jensen & Kieldsen *Baseline Study* 7.
[51] 6.
[52] 6.
[53] CR Barker "Church and State Relationships in German 'Public Benefit'" (2000) 3 *The International Journal of Not-for-Profit Law* (2000) 1 5.

Ethics/Philosophy during the rest of the year.[54] Learners are thus not penalised for electing to exercise their right to religious freedom, but their choices are respected and accommodated.

In recent years there has been a shift towards the introduction of Islamic religious education in German public schools. The number of Muslims in Germany is around 4 million[55] of which many are school-going children. Despite this fairly large Islamic community, religious education in line with the Islamic faith has not been wholly integrated into the German public schools system. The reason usually presented for this omission is that the Muslims in Germany do not have a common institution that can be treated as an educational partner to assist the state in presenting religious education.[56] It is also argued that the Islamic community does not have clear cut membership rights, which makes it difficult to determine when learners belong to the Islamic faith and need to be instructed accordingly.[57] Since the beginning of 2013 Islamic religious education is offered at selected schools across Germany.[58]

A lack of properly trained teachers has however slowed down the process of implementation and since its introduction the state has made a concerted effort to train enough teachers to meet the needs of Muslim learners. The first graduate class in Islamic religious education will be graduating in 2017 from the University of Münster[59] and Islamic religious education courses have been introduced at five other universities in Germany. Furthermore, the state has, as an interim measure, developed a programme through which Muslim educators who are teaching other subjects can obtain a certificate allowing them to present Islamic religious education.[60] The programme also allows Muslims enrolled in Islamic studies to be trained as teachers, enabling them to present religious education.[61] The process of implementing Islamic religious education in German public schools is a joint undertaking between the state and members of the Islamic religious community with a view to ensure that the religious rights of Muslim learners, teachers and parents are accommodated.

---

[54] Jensen & Kieldsen *Baseline Study* 13.
[55] 8.
[56] DT Kucukcan "Looking at Religions and Religious Education in Secular National Contexts in Western Europe" (2016) Centre for Islamic Studies < http://www.cie.ugent.be/kucukcan2.htm> (accessed 04-04-2016) 2.
[57] M Hunter-Henin *Law, Religious Freedom and Education in Europe* (2013) 178.
[58] U Hummel "Bumpy start for Islam classes in Germany" (2016) <http://www.dw.com/en/bumpy-start-for islam-classes-in-germany/a-16648215> (accessed 04-04-2016).
[59] P Morris, W Shepard & P Trebilco *The Teaching and Study of Islam in Western Universities* (2013) 178.
[60] Hummel "Bumpy start for Islamic classes in Germany" <www.dm.com>.
[61] Hummel "Bumpy start for Islamic classes in Germany" <www.dm.com>.

The German model of religious education is not perfect and the system is often presented with difficulties. The requirement that a minimum number of learners must be members of a particular religious community before religious instruction will be provided in accordance with their faith has the potential of excluding members of smaller or less organised religions.[62] Religious communities are also not homogenous in their beliefs and it may be that the content of religious instruction is contrary to the views of certain members of the religious community. It is impossible to design the curriculum in such a way that it satisfies every member of the religious community. There may be instances where instruction in a particular religion offends the religious or personal beliefs of some of the learners who adhere to that religion.

This is often the case where the personal views of the learner do not accord with the depiction of gender roles, sexuality or political positions.[63] The parents or learner may be either more religiously liberal or conservative. In these instances the option does exist to opt out of the religious education in favour of Ethics/Philosophy, but inevitably, this situation infringes on the learner's right in terms of article 7(3) of the German Basic Law. His/her right to religious instruction in the public school system is effectively negated by the curricular content. It is however not a complete deprivation of religious freedom as the learner is not forced to participate in instruction contrary to his beliefs and may still receive religious instruction outside of the school environment.

Regardless of these difficulties, the model of religious education that has developed in Germany is often hailed as an example of the role the state can play to accommodate and protect the religious rights of its inhabitants. It is regularly referred to as a model of "positive neutrality" in terms of which the state is forbidden to express a preference or a dislike for one particular religion or for religion in general, but is allowed to accommodate religious persons and communities who wish to manifest their religious beliefs in public.[64] The state is not allowed to support religious communities or denominations unless other religious communities and denominations are supported in a similar way.[65] Religious instruction can be viewed as an attempt by the state to allow for the exercise of religious freedom in the public sphere in a manner that does not lead to inequality or unfair treatment of certain religions over others.

---

[62] Shachar *Multicultural Jurisdictions* 156.
[63] 159.
[64] Hunter-Henin *Law, Religious Freedom and Education in Europe* 176.
[65] 176.

Shachar[66] argues that the institutional setting of religious education in Germany means that learners are not a "captive audience" as they often are where religious education or observances are presented in schools without rules and guidelines. Learners are therefore not subjected to direct religious coercion and the effect of indirect religious coercion is significantly reduced. This is ascribed to the fact that even minority religions are celebrated and accommodated in a constructive manner that does not single out those who do not subscribe to the majority religion. Because the different religions are treated fairly, religious minorities do not feel shunned by the majority as their religion is viewed as equally important.[67] The fact that religious education is conducted within a public setting also means that members of different religious communities interact and intermingle.[68] Although learners are separated during their religious education classes, the fact that religions are treated on an equal footing creates an environment in which learners feel more comfortable exchanging ideas about their respective religions.[69]

This model does not treat religious differences as something to be shunned or artificially omitted from the public sphere simply because they are controversial and complicated.[70] It rather allows religious differences to be part of the everyday life of learners in state schools and encourages inclusion in common spaces.[71] It permits and fosters accommodation, but in a non-exclusivist setting.[72] The different religions are not treated equally as they do not receive the same funding or resources. Religions are however treated equitably. It would be absurd to award the exact same funding and resources to the majority and the minority religions as it would place the minority religion in a privileged position. Resources are rather distributed based on the number of learners in the class, the number of teachers, the nature of the curricular materials and any special requirements to enable the school and the community to adequately teach the subject.[73] Religions are thus treated equitably, fairly and even-handedly and learners and parents are all placed in a position where they are able to enjoy religious freedom in the public sphere. The success of the German system is the result of the state's accommodative attitude and the joint state-religion relationship.

---

[66] *Multicultural Jurisdictions* 158.
[67] 158.
[68] 158.
[69] 158.
[70] 159.
[71] 159.
[72] 159.
[73] 156.

As has already been mentioned, the South African Constitution does not make provision for religious education, but rather for religious observances in public institutions. There are however similarities between the way in which the German Basic Law views religious education in the school system and the way in which the Constitution envisions religious observances. The manner in which religious education is treated in Germany can provide insight into the way in which section 15(2) of the Constitution, and especially the equity requirement, must be interpreted.

## 5 Understanding "equitable basis" under the South African Constitution

As has already been mentioned, the requirement of equity in section 7 of the Schools Act, read with 15(2)(b) of the Constitution, envisions a fair and even-handed treatment of different religions within the school environment. This means that one religion must not be advantaged or disadvantaged in a way that may benefit one religion over another.[74] Religions do not have to be treated in exactly the same way, but schools are prohibited from exclusively advancing the beliefs or teachings of a specific religion or religions over other religions represented in the school community.[75]

The aim of this section is to determine how the requirement of "equitable basis" must be dealt with practically by governing bodies and the school community. Drawing on the German model of religious education, the Policy on Religion and Education, case law, and legislative and constitutional provisions, suggestions will be made on what considerations should inform the framing of religious observances in public schools. It will be argued that the rules around religious observances must ultimately be guided by an accommodation approach that reflects the model of state-religion interaction envisioned by the Constitution.

### 5 1 General guidelines for drafting rules

As a point of departure it is clear that the needs and preferences of the learners and parents are decisive when making a choice about the religious observances that will be conducted at a particular school.[76] It would be irrational to present religious observances in accordance with all the different religions represented in South Africa, as it is unlikely for a school to have a learner from every religion in the country. A religion that is not practised cannot receive the same recognition and treatment as the religions that are represented in the pupil body.

[74] R Malherbe "Religion in school" (2013) 4 *NGTT* 1 6.
[75] P de Vos "Religion in schools: The finer details of the Constitution" (05-05-2015) *Daily Maverick* 1.
[76] Malherbe "Religion in schools" *NGTT* 6.

Accordingly, a school governing body making rules about religious observances must have information on the religious affiliations of the learners that attend the school. This information must be used for the sole purpose of facilitating and fostering equitable opportunities for religious observances and may not be used to victimize or vilify learners based on their religious convictions. A school is thus restricted to the religions of learners in the school and must find a way to balance and accommodate the needs of these religions.

Once the governing body has access to this information, it must consult with learners, parents and teachers on the exact content of the rules. As has already been mentioned, the coercive impact of religious observances in the school context can be mitigated by affording a wide interpretation to the equity requirement. During the drafting process, governing bodies must continuously question whether the rules on religious observances have the potential of directly or indirectly coercing learners towards one religion at the expense of other religions. If the rules are directly coercive they amount to an unconstitutional violation of section 15 of the Constitution and cannot form part of the school's religious policy. If the rules have an indirect coercive effect the governing body must determine what rules could be made to ensure the equitable and fair treatment of religions in a way that mitigates the coercive impact and protects the learners' right to dignity, equality, religious freedom, and is in the best interest of the child. It is submitted that religious observances must be limited to a set time of the day or the week. In this way parents and learners can be informed at the beginning of the school year when religious observances will be conducted and what options are available for their children.

The equity requirement does not mean that all religions in the school must be treated in exactly the same way. There is thus no need for all the religions to have the same sized venue or the exact same resources such as books or technological equipment. What would constitute equitable treatment will be context-specific and will be determined by the needs of the relevant religion as well as the number of adherents. In Chapter 4 it was suggested that governing bodies must embark on a process of consultation and meaningful engagement with the various role players affected by the rules on religious observances. The purpose of this engagement is to determine the specific needs of adherents of every represented religion so as to ensure that the rules adequately provide for their needs. Sometimes it might be enough to provide adherents of a minority religion with a classroom to conduct their religious observances. Another religion might require a classroom and access to certain religious texts, or simply a quiet space where they can gather for a moment of silence. As was mentioned in Chapter 3, the National Policy on Religion and Education attempted to address the equity

requirement by making suggestions on how equity can practically be achieved in the school system.

5 2 National Policy on Religion and Education and "equitable basis"

Section 61 of the Policy suggests that "equitable means of acknowledging the multi-religious nature of a school community may include […] [the] rotation of opportunities for observance, in proportion to the representation of different religions in the school." Consider the following example: a school has a hundred learners of which eighty are Christian, ten are Jewish and ten are Muslim.[77] According to the Policy it would be equitable for the school to have religious observances in accordance with the Christian faith for sixteen of the twenty school days in a month while Jewish observances are conducted for two of the twenty days and Muslim observances for the remaining two days.

This suggestion in the Policy gives rise to certain constitutional difficulties. I would argue that the suggested arrangement does not meet the requirement of equity in the Constitution as it still allows the majority religion to be afforded disproportionately more time and resources than the minority religions. It also increases the coercive pressure on *all* the learners in the school. When Christian observances are being conducted, dissenting learners will have to ask to be excused from participating. The Christian learners will be placed in a similar position when religious observances are conducted in accordance with the minority religions. A system of proportionate representation does not mitigate the impact of religious coercion, but rather enhances the coercive burden.

The "use of a universal prayer" is also mentioned in section 61 of the Policy as an option to achieve equity. Smith[78] argues that equity will not be achieved by the use of a bland prayer which makes no mention of any particular religion or denomination. A prayer of this kind would discriminate against the religious rights of those whose religion requires very specific religious practices or phrasing. All religious adherents will be subjected to a prayer that does not accord with their beliefs while being denied the right to pray in a manner that reflects their religion. The Policy does however suggest the separation of learners according to their religion, with equitably supported opportunities for observances by all faiths, and appropriate use of the time for those holding secular and humanist beliefs.[79] Section 61 also mentions "a period of silence" as a mechanism to achieve equity amongst religions in the school.

[77] Smith "Religious freedom under the final Constitution" *SALJ* 221.
[78] 221.
[79] Section 61 of the Policy.

A "period of silence" is a very effective and equitable way of complying with section 7 of the Schools Act and section 15(2) of the Constitution in that it gives every learner, parent and teacher an opportunity to use the time to pray or observe in accordance with their own religion, without subjecting themselves to possible coercive pressure. It also makes provision for non-believers as they are allowed to simply observe the moment of silence without feeling pressured to attach any religious meaning to it. It is an easy way for a school governing body to ensure that religious observances are conducted without running the risk of being accused of coercing learners towards a specific religion or treating religions unfairly. Only allowing for a moment of silence is however a very limited interpretation of section 15(2) of the Constitution as it simply creates a brief opportunity for religious observances without the school really taking active steps to facilitate and accommodate different faiths.

The Policy's suggestion that learners be separated according to religion, with equitably supported opportunities for observances by all faiths, requires a much more active role by the school governing body and is arguably more in line with the equitable basis requirement in the Constitution.[80] It is in this context that the German approach to religious education is particularly interesting as it also entails the separate teaching of learners according to their faith. Although religious observances in the South African context and German religious education are not the same, the German model of religious education does provide an example of how to deal with different religions in an equitable manner. The German approach requires the school and the state to consider the religious composition of its school community and take active and equitable steps to realise the religious rights of the learners.

If a school has a minority of Jewish learners, and they meet the minimum numerical threshold, there is an obligation on the school to make provision for Jewish religious education. The same is true for any other religious community represented within the learner body. The school may not just shirk its responsibility toward the minority and only allow for religious instruction for the majority religion. The recent introduction of Islamic religious education is a result of the schools and the state identifying the need for a religious community to be accommodated within the school context and taking active steps to realise the community's right to religious freedom.

Religious instruction in the German context is part of the official curriculum and places a substantial burden on schools and the state to fulfil their obligation towards parents and learners. Section 15(2) does not place as big a burden on South African public schools and

[80] R Malherbe "Enkele kwelvrae oor die grondwetlike beskerming van die reg op godsdiensvryheid" (2006) *Tydskrif van die Suid-Afrikaanse Reg* 629 647.

the state. Religious observances are not part of the official curriculum and do not have to be conducted by a teacher that is specifically trained to perform the observances. Religious observances in South African public schools are typically also conducted for shorter periods of time than the religious instruction classes in Germany. A public school must not shirk its responsibility in terms of section 15(2) because it perceives the equitable treatment of religions as too burdensome. The Constitution requires the school to be proactive in facilitating and accommodating religious observances, but it does not expect schools to conduct the observances themselves or to incur any curricular burden. It simply expects governing bodies to make rules to accommodate the different religions in the school and to foster an environment where religious differences are accepted and celebrated.

5 3 "Accommodation" as a guiding principle for the formulation of rules

Chapter 2 dealt extensively with the accommodation model of state-religion interaction that is envisioned by the Constitution. It is a model of interaction that requires the state to positively recognise all religious identities and adopt an even-handed approach between religions.[81] It is also the model that must guide and inform the equitable treatment of different religious observances in the public school sector. The court in the *Pillay* case formulated the concept of "reasonable accommodation" as a way of addressing religious diversity in the school context. "Reasonable accommodation" as a legal norm contains something of the Constitution's accommodation model and can be used as a guiding principle to underpin the drafting of rules on religious observances. Reasonable accommodation is the notion that the state, community or a school must sometimes "take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally."[82]

Reasonable accommodation is an exercise in proportionality that will ultimately depend on the facts.[83] In the *Pillay* case the court ordered the school to provide in its code of conduct for the reasonable accommodation of deviations from the code on religious or cultural grounds.[84] The court had to weigh the relative importance of the religious practice of wearing a nose stud with the hardship that permitting the learner to wear the stud would cause to the school.[85] The concept of reasonable accommodation has the ability to foster tolerance and

[81] Bilchitz & Williams "Religion and the public sphere" *SAJHR* 170.
[82] *Pillay* para 73.
[83] Currie & De Waal *Bill of Rights Handbook* 325.
[84] *Pillay* para 119.
[85] Para 114; Currie & De Waal *Bill of Rights Handbook* 325.

encourage the accommodation of religious and cultural diversity.[86] As it has already been incorporated into the law of religious freedom in *Pillay*, it can arguably be applied within the context of religious observances in public schools.

The role of reasonable accommodation is to underpin the equity requirement. The rules made by a governing body must ensure that religious observances are conducted on an equitable basis, and members of different religions are reasonably accommodated within the school environment.[87] Fair opportunity must be given to all to organise and attend their own religious observances while non-believers must be reasonably accommodated and may not be unfairly discriminated against.[88] In determining what would be equitable in the circumstances the governing body must therefore consider whether reasonable accommodation can be made for minority religions.

The governing body must weigh up the relative importance of the learner's right to religious observances as well as the impact the denial of religious observances will have on the learner's right to religious freedom, dignity and equality, with the hardship the school has to endure to accommodate the learner. If the impact on the school is marginal, while the impact on the learner is disproportionately coercive and burdensome, the governing body must accommodate the learner's religious observances. This will require it to take positive action to ensure equity towards the religions of the minorities.[89] Furthermore, a governing body cannot make rules to accommodate the majority religion while only making allowance for the minority to abstain from participation. This falls short of the school's constitutional obligation to treat religions equitably.

One of the reasons the German model of religious instruction is so successful is the close working relationship between religious institutions and the state. Religious instruction is usually presented by a member of the religious community while the curriculum is also determined by the different religious institutions. Smith[90] suggests that a similar approach should be adopted in respect of religious observances in South African public schools. Ideally, the religious observances should not be run by the school itself, but by religious leaders of the various represented faiths.[91] It is common for schools to arrange members of

[86] Malherbe "Religion in schools" *NGTT* 5.
[87] 7.
[88] 7.
[89] EFJ Malherbe "Die grondwetlike beskerming van godsdiensvryheid" (2008) 4 *Tydskrif van die Suid-Afrikaanse Reg* 673 696.
[90] "Freedom of religion under the final Constitution" *SALJ* 222.
[91] 222; Malherbe "Religion in schools" *NGTT* 6.

faith communities to present a religious message during school assemblies or address the school in anticipation of religious holidays like Christmas or Ramadan.

Unfortunately, there is often a tendency in South African public schools to invite only members of the majority religion. Learners from religious minorities are either subjected to observances of the majority or, if they select to abstain from participation, are not provided with a constructive alternative. Learners are either left alone in a classroom or, if they are under the supervision of an adult, that person is usually not charged with providing an alternative, constructive way of passing the time.[92] This approach negates the religious rights of minority religions and does not reasonably accommodate their religious needs. It is a blatant violation of the equity requirement in section 7 and section 15(2) as the school makes no attempt to provide for the even-handed treatment of religions.

A school can only truly comply with the equity requirement if it makes a concerted effort to ensure that religious alternatives are available to learners of minority religions. This means inviting leaders or members of the minority religious community to conduct observances for the learners who do not conform to the majority religion. While a minister is thus reading from the Bible and praying with the Christian learners, an Imam can discuss the Koran with the Muslim learners, and a Rabbi can address scriptures of the Torah with the Jewish learners. Cognisance must also be taken of intra-denominational religious differences. For example, Christianity must not be viewed as a homogenous religion, but schools must take into account the differences in belief, practice and observance within the faith. There is a difference between a learner adhering to Catholicism and a learner belonging to the Dutch-Reformed Church and their observances must be accommodated accordingly.

A constructive alternative should also be available for the non-believers. In Germany, Ethics/Philosophy caters for the non-religious learners. It is not suggested that a school must necessarily develop a similar subject for learners to study while their religious counterparts partake in religious observances. It is however not enough to expect these learners to do nothing. They must be allowed to participate in some activity that expresses their secular word-view.[93] This could take the form of a discussion class where various societal issues, including religious diversity, are discussed. It can also take the form of readings about ethics, philosophy or the practices of different religions. There may also be a need to engage with learners about the content of these classes. If there is a particular world event dominating the

[92] Smith "Freedom of religion under the final Constitution" *SALJ* 221.
[93] 222.

news that week, learners might want to use this opportunity to engage in a discussion about the event.

While it is important for governing bodies to have clear rules about religious observances, it is submitted that they must guard against a too formalistic approach. The German model of religious instruction requires a certain number of adherents in a school to present instruction in a particular religion. In South Africa, rules that require a minimum number of learners have the potential to unduly restrict the equity requirement and are open to abuse by a governing body that does not have an interest in protecting the religious rights of minorities. If a learner is the only Jehovah's Witness in the school, the governing body cannot simply say that there are too few adherents to require the school to arrange for religious observances in line with his faith.

The governing body must determine whether the needs of this learner can be reasonably accommodated within the school environment. The school needs to contact the learner's parents and inquire if they know of someone who might be available to conduct religious observances for the learner at the school. If this possibility exists the school must make a classroom available for the learner to observe his religion while the majority participate in their religious observances. If there is a minority of Muslim learners in the school, these learners must be given a fair opportunity to conduct religious observances in accordance with their faith. This means that the school must engage with the parents, learners and religious leaders to find a way to accommodate the learners' religious observances. The learners could be accommodated in a separate venue where observances are presented by a member of their faith community. The learners could also be provided with copies of the Koran or other Muslim texts which they can read and engage with during this time.

Schools must also be mindful of treating religions equitably at events where there is a captured audience like graduation ceremonies and school assemblies. In these circumstances it would not be appropriate to observe only the majority religion by way of a prayer or a reading from scripture. This will not only create coercive pressure as discussed in the previous chapter, but will also fail under the equity requirement. If a school wants to observe religion at these events accommodation must be made for members of minority religions. This could essentially mean that, instead of praying aloud, a moment of silence is observed where parents, learners and teachers can silently observe their religion.

Depending on the nature of the different religions represented at these ceremonies it would also be equitable to allow a representative of each represented faith community a brief opportunity to observe their religion at the event. If half of the learners are Muslim and the

other half is Christian, it would only be fair to allow for both a Christian and a Muslim prayer. Alternatively, a message on ethics can be delivered that is neutral towards religion, but promotes important societal values such as dignity, respect and equality. The same approach should be followed where religious observances are conducted in the classroom setting. If the governing body makes rules allowing for religious observances in the administrative period at the beginning of the day, they must reasonably accommodate the different religions represented in the class.

If a school has a majority of Muslim learners and some classes comprise only Muslim learners, the teacher of such a class can start the day with an observance in line with the Muslim faith as she would not be infringing on the rights of any learner in the class. If there are however three Christian learners in the class the rules of the governing body must make provision for these learners. If the rules state that religious observances are conducted between 07:45 and 08:00 in the mornings, the school can make a separate classroom available for all the Christian learners in the school where they can read from the Bible and pray together. The learners can then go to this separate classroom at the beginning of the day, saving them the embarrassment and undue coercive pressure of having to leave the class in front of all the Muslim learners. Depending on the age of the learners the school can make a Christian teacher or parent available to facilitate the observance, or simply supervise in the case of older learners. At the start of the first period the learners can join the class without too much attention being drawn to them.

It is, however, important for schools not to artificially manufacture the composition of their classes so as to create religiously homogenous classrooms. It would not be appropriate for a school to segregate the learners according to their religious convictions during the normal course of the day, simply because it is more convenient to manage the religious observances. This will be tantamount to an apartheid-style approach to religious differences and will be constitutionally suspect. The separation of learners during the religious observance itself serves an important purpose as it prevents undue coercion and the infringement of religious freedom. A similar separation during the course of the day will however foster religious intolerance and discrimination amongst the learners in the school.

The Constitution requires religions to be treated equitably, which is a weaker standard than equality. Equitable basis does not mean that a school must go above and beyond what is reasonable in the circumstances. Consider the following example. A learner, in a school with predominantly Muslim learners, is a Jehovah's Witness. The school is situated in a small town which does not have a large following of Jehovah's Witnesses. The parents, as well as

the religious leaders, have indicated that there is nobody who is willing to come to the school on a Wednesday morning, when religious observances are conducted, to assist the school in accommodating the learner's religious needs. The school is not obliged, on their own initiative and cost, to transport a Jehovah's Witness from another town who is willing to conduct the observances. When weighing the burden on the school against the impact on the learner it is clear that in accommodating the learner the school will have to incur a disproportionate and undue hardship.

In these instances the school must consult with the learner and the parents to find a solution. If the parents are willing and able, they can conduct religious observances at home on a Wednesday morning and only bring the learner to school once the first period starts. They can also provide the school with readings for the learner that he can engage with in a separate classroom while the Muslim learners participate in their religious observances. Although this learner might not be treated in exactly the same way as the Muslim learners in the school, it is the most equitable arrangement in the circumstances. A situation like this might often occur where learners adhere to very small minority religions and it is difficult for the school to make equitable arrangements.

There is also much argument as to whether a public school can be a single-faith based school where observances are conducted only in accordance with a particular religion.[94] The Schools Act, the Constitution and the Policy do not explicitly preclude this possibility and it would arguably be allowed in certain contexts. Where a school has a religiously homogenous learner body, as sometimes happens in smaller schools or schools located within a religiously homogenous community, it would arguably be acceptable for the school to conduct religious observances in accordance with only one faith. This model would not violate religious freedom as it is the most equitable outcome in the particular instance.

The burden on governing bodies may also be different if learners and parents do not care about being exposed to religions other than their own. Parents often allow their children to go to schools where they are fully aware that the majority of the school adhere to a religion other than their own. In this instance it would be possible for a learner to elect to partake in the observances of the majority, precluding the need for the school to take steps to accommodate

[94] Malherbe "Enkele kwelvrae oor die grondwetlike beskerming van die reg op godsdiensvryheid" *TSAR* 647; The existance of single-faith schools is supported by section 7 of the the South African Charter of Religious Rights and Freedoms which allows for an educational institution to adopt a religion or ethos, as long as it is observed in an equitable, free, voluntary, and non-discriminatory way. The Charter was drafted in terms of section 234 of the Constitution and endorsed on 21 October 2010, but has not been enacted by Parliament and has not been tested for constitutional compliance. It is also unclear what the legal status of the Charter will be and how it will interact with the Constitution, Schools Act, and the Policy on Religion and Education.

the learner. In these cases the learners might simply be indifferent to religion altogether and a school will not be acting unconstitutionally if it does not take steps to accommodate these learners and their observances. Schools must, however, make very sure that parents and learners are accepting of and comfortable with such an arrangement and not simply assume this to be the case.

The success of ensuring the fair and equitable treatment of religions in the public school system lies in the making of clear rules around the time and the place of religious observances. Although the school may not prohibit learners from engaging in religious observances on their own accord, the governing body must be mindful to formulate proper rules around religious observances facilitated at the school itself. Where the school actively creates an opportunity for religious observances, either as an event during the school week or at special occasions and assemblies, it must be clear exactly when the observances will occur, by whom they will be presented and what form they will take. This allows the governing body to facilitate the practical effect of equitably accommodating the minorities. They will be able to give parents, learners and religious leaders clear information on when, where and how the minority religions can be accommodated.

The equitable treatment of religions in the public school system also requires that governing bodies must revise their religious rules or code on a yearly basis. It should be a living document that must be adjusted to the changing needs of the pupil body. Although section 7 of the Schools Act identifies governing bodies as the "appropriate public authority" to draft rules on religious observances, the drafting process must be one of proper consultation with parents, learners and teachers, with some input by the Department of Education. The rules must be a reflection of the most equitable model of religious observances for a particular school, with clear evidence that religious minorities have been reasonably accommodated.

## 6 Conclusion

The requirement of "equitable basis" purports to strike a balance between the damaging effect of religious coercion and the right to conduct religious observances in the public school setting. Its purpose is to ensure that religious freedom is protected, despite the existence of a diversity of religions. Schools, and especially governing bodies, have an obligation to take positive steps to facilitate and accommodate religious minorities. The principle of reasonable accommodation must guide and underscore the equity requirement as it creates a standard to which schools must aspire in making arrangements for those who do not adhere to the

majority religion. Learners can never be completely free of at least some form of indirect coercion. The effects of the coercion can however be mitigated by allowing a wide interpretation of the equity requirement. Minority religions must be treated fairly and equitably. This strikes a balance between the impact of the coercion and the protection of religious freedom, equality, dignity and the best interest of the child.

# CHAPTER 7
# CONCLUSION

## 1 Introduction

This study set out to explore how the requirements for religious observances in state and state-aided institutions must be interpreted within the context of public schools, to strike a constitutionally appropriate balance between the powers of school governing bodies and the right of learners to be free from religious coercion. During the course of the study it became clear that there are multiple factors that influence the way in which religious observances in public schools must be structured. The Constitution envisioned a model of state-religion interaction centred on the accommodation of religious diversity; however, the practicality of conducting observances in schools is more challenging.

As a point of departure, section 15(2), read with section 7 of the Schools Act, is not a stand-alone provision but functions within a complex constitutional, legislative, policy and international law framework. The impact of and the precise weight that is attached to different constitutional rights and freedoms, legislative provisions and policy documents, is context specific and depends on factors that are unique to a particular school. It thus became clear that section 15(2) cannot be afforded a blanket-interpretation, but will be influenced by considerations such as the religious demographic of the school, the practicality of alternative accommodation for minority religions, the impact of religious coercion on the learners and the wishes of learners and parents not to be subject to observances.

It also became clear that the Constitution requires governing bodies to act much more vigilantly in making rules on religious observances than simply assigning the school a religious character or ethos. Section 15(2) of the Constitution and section 7 of the Schools Act require "rules" that adhere to the rule of law, and set out the nature and the content of religious observances in a discernible and accessible way. Governing bodies are also obliged to consult and engage during the rule-making process, taking into account the needs of the school community, and being guided by the overarching obligation to serve the best interest of the children who will partake in the observances.

An analysis of the way in which foreign jurisdictions approach religious coercion suggests that a too strict interpretation of "free and voluntary" would negate the existence of section 15(2) in its entirety. It was thus argued that a measure of indirect religious coercion must be tolerated under the Constitution, but that the effect of this could be mitigated by requiring a high standard of equitable treatment amongst the different religions represented in the school

community. This means that schools and governing bodies must take active steps to reasonably accommodate and facilitate religious observances. It must be done in a way that ensures the least amount of coercive pressure on learners, while providing every represented religion with an opportunity, as far as reasonably possible, to conduct observances in accordance with their faith.

## 2 Recommendations

This section will reflect on some of the conclusions that were drawn at different points in this study and the recommendations that have emerged from the various chapters. Chapter 2 focussed on the relationship between the state and religion in South Africa. Various models of state-religion interaction were discussed, as well as the colonial and apartheid histories of the relationship between religion and the state in South Africa. It was found that the role of religion in South Africa has historically been characterised by racial discrimination, social exclusion and political disempowerment. This history has informed and shaped the current constitutional provisions on religious freedom and must inform any interpretation of section 15 and the supporting rights in the Bill of Rights.

The Constitution did not envision a complete separation of religion from the state, but rather opted for the accommodation model in which the state accommodates and facilitates religious diversity. This model is rooted in the idea of the equal worth of every individual, regardless of their religious convictions. It protects persons from religious coercion by the state and places an obligation on the state to create enabling conditions for the positive expression of religious identity. The state is thus required to treat religions in an even-handed manner, positively recognising the different religions present within the state. It requires the state to be an active role-player in matters of religion and not a neutral presence that completely withdraws religion from the public sphere. It is recommended that the constitutionality of religious observances be construed against the background of the accommodation model as it lays the foundation for the way in which state and state-aided schools must engage with religion. Any interpretation must also be informed by South Africa's particular history and aim to ensure that religion is never again used as a means to divide our society.

Chapter 3 focussed on the constitutional, legislative and policy framework that currently governs religious observances in South Africa. This chapter illustrated the complexity of the various rights and freedoms that have to be balanced in order to determine how religious observances must be structured in the school environment. The right to religious freedom, the

right to equality, the right to human dignity, freedom of expression, the right to assemble, demonstrate, picket and petition, freedom of association, the right to a religious community and the best interest of the child are all constitutional rights that have to be weighed and balanced when making rules around religious observances. The general limitation clause provides further guidance on how the tensions between these rights are to be negotiated. Religious freedom thus does not function in isolation, but interacts with these supporting rights and provisions in a variety of ways. The supporting rights can either enhance the right to religious freedom or conflict with it. In cases where conflict occurs, the competing rights have to be balanced, taking into account the nature and the importance of the right in order to find an equitable outcome.

Central to this balancing inquiry is the best interest of the child. The Constitution, as well as the CRC, requires the best interest of the child to be the overarching principle guiding any decision that could impact on the child. One way of giving effect to this provision is by allowing children's voices to be heard. In South Africa there is a serious need for the opinions of children to be taken more seriously in matters concerning them. There is no legislation regulating the religious autonomy of children. Moreover, in neither the *Pillay* nor the *Christian Education* cases, the only cases to date dealing with the religious and cultural rights of children, were the children in question given an opportunity to speak. It is recommended that the legislature consider enacting legislation that allows children religious autonomy upon reaching a certain age. They can then legally make their own choice on whether they want to participate in observances or not.

The constitutional framework that governs religious observances is vague and fails to provide governing bodies with clear guidelines for the drafting of rules. This has led to schools abusing religious observances to further a very specific religious ethos or character, or simply refraining from drafting rules. The Schools Act and the Policy on Religion and Education were meant to address this difficulty, but have failed to provide a clear and binding guideline that can properly assist schools. The Schools Act simply reiterates section 15(2) of the Constitution, while the Policy makes suggestions that are themselves constitutionally problematic and infringe the right to religious freedom.

The Policy is also not a binding document, allowing schools to ignore its provisions in favour of their own approach. It is therefore recommended that the Department of Education embark on a review of the Policy to bring it in line with the Constitution and, possibly, consolidate it into legislation. The review must allow for consultation with various stakeholders, most notably learners. Cognisance must be taken of international law

instruments that regulate religious freedom and the rights of children. These documents contain important guidelines that can provide insight into the way in which section 15(2) of the Constitution must be interpreted.

Chapter 4 set out to interpret certain parts of section 15(2) and section 7 of the Schools Act. Firstly, the meaning of the word "rules" was addressed. It was found that governing bodies are organs of state that perform a public function when making rules on religious observances. These rules must ensure parity of treatment, be enforced in terms of a discernible standard to ensure that there is no arbitrary abuse of power, be precise, and be accessible to all the affected individuals. It is recommended that schools formulate written rules that are clear and allow for an exemption procedure. These rules must be made available to all existing parents, as well as prospective parents to inform them of the religious policy of the school. A poorly drafted religious policy can form the basis for a finding of unconstitutionality as it does not comply with the rule of law.

Furthermore, Chapter 4 analysed the powers of governing bodies as the "appropriate public authorities." Although no case has specifically dealt with section 15(2) or section 7 of the Schools Act, the drafting of language, pregnancy and admission policies is analogous to the power to formulate rules on religious observances. From the case law, various considerations emerged that must guide governing bodies when making rules about the nature and the form of religious observances in their respective schools. Firstly, governing bodies are obliged to consider the needs of all the learners, parents and teachers within the school community. They represent the interests of these stakeholders and must objectively and without any prejudice act in the best interest of all their learners – not just the majority.

Secondly, the powers of governing bodies are subject to the Constitution, the Schools Act and any applicable provincial law. The Schools Act allows an HOD to intervene in the powers of the governing body where it is clear that the latter infringes on the rights of learners, parents and teachers. Provincial legislation can also be enacted to limit the powers of governing bodies. Thirdly, the best interest of the child must guide the exercise of power. The processes followed and rules made by the governing bodies, must make the best interest of the child the primary consideration. Lastly, there is an obligation on governing bodies and the state to cooperate and engage with each other in a meaningful way. It is recommended that this process of engagement commence at the start of a dispute and that it must be guided by the best interest of the children. In this way the worrying trend of litigious disputes between governing bodies and the state can be minimised. It is also recommended that the

Department appoint a committee to oversee the religious policies of schools and train them on how to comply with section 15(2).

Chapter 5 dealt with the interpretation of "free and voluntary. The chapter provided an overview of direct and indirect coercion. It was found that, while direct religious coercion is expressly prohibited by the Constitution, indirect coercion might also have an impact on the voluntariness of the decision to participate in religious observances. The chapter set out to determine how indirect religious coercion should be interpreted in South Africa so as to ensure that observances do not place an undue burden on learners to participate in observances they do not subscribe to. By analysing the American, Canadian, and German approaches to indirect coercion the following could be discerned.

The American courts have completely outlawed any form of religious coercion, including indirect religious coercion, in their public schools. This is ascribed to the existence of the Establishment Clause in the First Amendment to the United States Constitution which does not allow for state-religion interaction. Their Canadian counterparts opted for the same approach, albeit by different means. The courts found that any form of indirect religious coercion in the school context violated the right to religious freedom. By interpreting religious coercion very strictly to include even the mere suggestion of indirect coercive pressure, the courts effectively outlawed religious observances without the existence of an Establishment Clause. Germany has in turn adopted a much more lenient approach, in terms of which the risk of indirect religious coercion can be outweighed by the rights of other learners and parents to partake in religious observances. By weighing competing rights, the German courts found that indirect coercion did not place such a strenuous burden on the dissenting learners as is the case in the American and Canadian courts.

It is recommended that the South African courts must refrain from a too strict interpretation of indirect coercion as this can have the unintended consequence of completely negating the existence of section 15(2). The Canadian approach illustrates this danger by erecting a wall of separation between religion and the state that was never meant to exist. A too strict interpretation of indirect coercion that includes all potential forms of subtle pressure will ultimately result in a blanket ban on all religious observances in public schools. This was not the intention of the constitutional drafters, nor is it an interpretation that is reconcilable with the wording of section 15(2).

It is recommended that South Africa follow an approach somewhere between that of Germany and the United States/Canada, where competing rights and freedoms are weighted and balanced to determine if religious coercion is unduly burdensome. The South African

approach must, however, be a bit more sensitive to the effects of indirect coercion than the German courts and must refrain from simply assuming that learners do not experience coercion or that the existence of an exemption completely remedies any coercive pressure. The aim must be to structure observances in such a way that the negative effects of coercion are minimised as far as possible. An approach like this will not completely eliminate indirect coercion, but can ensure that the effect on learners is not too damaging. Another way of achieving this purpose is by ensuring that a high standard of equity is required when interpreting "equitable basis" in section 15(2).

Chapter 6 addressed the interpretation that must be afforded to the equity requirement. As a point of departure it was submitted that equity is not the same as equality. Although the two concepts are related, equity should not be read as requiring the absolute equal treatment of all religions. Equity is an ethical imperative, associated with principles of social justice and human rights. What is equitable in a particular situation will depend on the facts and the contexts of the matter, as well as the human rights that are affected. An analysis of the case law dealing with the interpretation of "equitable basis" makes it clear that this section requires the even-handed treatment of religions and allows for religions to be treated differently, as long as it does not constitute inequitable treatment. It is recommended, on the basis of O'Regan J's approach to religious equity in the *Lawrence* case, that religious observances should reflect, as far as possible, the religious beliefs of the particular community or group, with "community or group" referring to all individual members and not just the majority.

It is recommended that South Africa approach the equitable treatment of religious observances in a way that is similar to the way in which Germany approaches religious instruction. Rules must allow learners of all religions to be treated in a fair and equitable manner and schools are under an obligation to accommodate minority religions. The Constitution requires schools and governing bodies to be proactive in facilitating and accommodating religious observances. If the rules have an indirect coercive effect the governing body must determine what rules could be made to ensure the equitable and fair treatment of religions in a way that mitigates the coercive impact and protects the learners' right to dignity, equality, and religious freedom and is in the best interest of the child.

It is recommended that schools avail themselves of the religious affiliation of their learners and work together with parents, religious leaders, learners and the larger school community to determine the best way to accommodate the differences. It is also recommended that schools not carry the burden of religious observances alone, but actively engage with the

leaders of represented faiths to assist them in this task. Schools are expected to make provision for constructive alternatives for learners who do not adhere to any religion at all. Simply letting these learners sit idly is not sufficient – schools must engage with leaners and parents to find a way to allow these learners to express their secular world-views.

In making rules on religious observances schools must refrain from a too formalistic approach and must rather be guided by the concept of "reasonable accommodation." This requires them to take positive measures, and possibly incur hardship and expense in order to allow learners to practise their religions in an equitable manner. Reasonable accommodation is an exercise in proportionality and what would be equitable in a particular case would depend on various context-specific considerations. It does not require the school to go above and beyond the call of duty to accommodate learners, but expects schools to at least attempt to address the religious needs of those learners that do not adhere to the majority religion. Sometimes equity requires the school to arrange for a Rabbi to come to the school for the Jewish learners, while in other instances it could simply mean allowing parents to bring their child to school after the observances had already been conducted.

A model like this can only be successful in cases where schools actively engage with the learners, parents, teachers and larger school community. It is recommended that schools must revise their religious policy at least once a year and adjust it to the changing needs of the pupil body. The rule-drafting process must allow input from all the different role-players in the school and must allow for their voices to be heard. This must be done in a non-discriminative way that celebrates religious differences rather than simply tolerating it as a necessary burden that the school has to bear.

## 3 Concluding remarks

The right to religious freedom is one of the oldest and most sacred of human rights. It speaks to the most personal part of human experience and provides the moral compass by which many guide their existence. South Africa's past is marred by racial exclusion and discrimination, political disempowerment and religious oppression. It is a fractured history that left many disillusioned and marginalised.

The Constitution is a transformative document. It speaks to the change that democracy brings and recognises the inherent humanity of every individual. Religious freedom is central to this vision of a humane society. The accommodation model envisioned by the Constitution reflects this understanding and allows for religion to form part of the public sphere. The right

to conduct religious observances in section 15(2) is a manifestation of religious freedom and allows an all-encompassing human experience.

It is against this background that religious observances in public schools must be interpreted. There are many instances where this right is being abused by schools that force learners to participate in observances against their will. Similarly, there are schools that completely refrain from religious observances as it is viewed as too heavy a burden, or simply not part of their public duty. The language of abuse and the language of apathy kept colonialism and apartheid alive and should not be allowed to become the language of democracy. Schools must not only allow learners who want to participate in religious observances to do so, but must take steps to facilitate observances that reflect the diversity of religions represented in the school community.

The right to conduct religious observances is not something that must be tolerated as a necessary evil. It is a right that allows for the celebration of diversity, for the understanding of the "Other", and for the building of a more inclusive society. Schools are in a position to influence and shape the minds that will lead this democracy. The way in which they experience religious diversity and the way in which schools address this diversity will set the tone for the way in which South Africa will deal with religious freedom in the years to come. Religious observances in the public school context create an opportunity to celebrate the diversity that the Constitution professes and to ensure that religious intolerance and oppression remain remnants of a distant past.

# BIBLIOGRAPHY

## BOOKS

Adam G, Rothgangel M, Lachmann R, Schlag T & Schweitzer F (eds) *Basics of Religious Education* (2014), Göttingen: Vandenhoeck & Ruprecht.

Behr AL *Education in South Africa: Origin, Issues and Trends, 1962-1988* (1988), Pretoria: Academia.

Berman HJ *The Interaction of Law and Religion* (1974), Nashville: Abingdon Press.

Breen C *The Standard of the Best Interest of the Child: A Western Tradition in International and Comparative Law* (2002), Leiden: Springer Netherlands.

Chidester D *Religions of South Africa* (1992), London: Routledge.

Cross M *Resistance and Transformation: Education, Culture and Reconstruction in South Africa* (1992), Johannesburg: Skotaville.

Crozier J, Grandinson J, McKeown C, Summers E, Weber P (eds) *Collins English Dictionary* (2005), Glasgow: HarperCollins.

Currie DP *The Constitution of the Federal Republic of Germany* (1994), Chicago: University of Chicago Press.

Currie I & De Waal J *Bill of Rights Handbook* 6th ed (2013), Claremont: Juta.

Currie I & De Waal J *The New Constitutional and Administrative Law* (2005), Claremont: Juta.

Devenish GE *The South African Constitution* (2005), Cape Town: Butterworths.

Du Plessis J *A History of Christian Missions in South Africa* (1911), Cape Town: Struik.

Du Toit CW & Kruger JS *Multi-religious Education in South Africa: Problems and Prospects in a Pluralist Society* (1998), Pretoria: University of South Africa.

Elphick R *The Equality of Believers: Protestant missionaries and the racial politics of South Africa* (2012), Scottville: University of Kwazulu-Natal Press.

Hartshorne K *Crises and Challenge: Black education 1910-1990* (1992), Cape Town: Oxford University Press.

Hogg P *Constitutional Law of Canada* 3rd ed (1992), Scarborough: Carswell Legal Publishers.

Hunter-Henin M *Law, Religious Freedom and Education in Europe* (2013), London: Ashgate. Publishing

Kleynhans EPJ *Die Kerkregtelike ontwikkeling van die Nederduitse Gereformeerde Kerk in Suid-Afrika 1759-1962: 'n Kerhistoriese-kerkregtelike Studie* (1973), Pretoria: NG Kerkboekhandel.

Kommers D *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989), London: Duke University Press.

Luthuli PC *The Philosophical Foundations of Black Education in South Africa* (1981), Durban: Butterworths.

Maunz T & Zippelius R *Deutsches Staatsrecht* (1998), Munich: CH Beck.

McKerron ME *A History of Education in South Africa (1652-1932)* (1934), Pretoria: Van Schaik Publishers.

Meyerson D *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997), Kenwyn: Juta.

Mncube VS *School Governance in the Democratisation of Education in South Africa: The Interplay between Policy and Practice?* (2005), Birmingham: University of Birmingham.

Moodie TD *The Rise of Afrikanerdom* (1975), California: California University Press.

Naicker N *Imbalance and Inequities in South African Education: A Historical-educational Survey and Appraisal* (1996), Pretoria: University of South Africa Press.

Rautenbach IM & Malherbe EFJ *Constitutional Law* (1999), Durban: LexisNexis Butterworths.

Seligman AB *Religious Education and the Challenge of Pluralism* (2014), Oxford: Oxford University Press.

Shachar A *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001), Cambridge: Cambridge University Press.

Temperman J *State-Religion Relationships and Human Rights Law: Towards a Right to Religious Neutral Governance* (2010), Leiden: Martinus Nijhoff Publishers.

Troup F *Forbidden Pastures: Education under Apartheid* (1976), London: International Defence and Aid Fund.

Van Aswegen HJ *The history of South Africa to 1854* (1990), Pretoria: JL van Schaik Academic.

Vorster JD *Die Kerkregtelike Ontwikkeling van die Kaapse Kerk onder die Kompanjie* (1956), Potchefstroom: Pro-Rege.

## CHAPTERS IN BOOKS

Brugger W "Structural Norms and Constitutional Rights in Church-State Relations" in W Brugger & M Karayanni (eds) *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (2007) 21 - 86, Mörlenbach: Springer.

Cumper P "Religious Liberty in the United Kingdom" in JD van der Vyver & J Witte (eds) *Religious Human Rights in Global Perspective* (1996) 205 - 242, The Hague: Kluwer Law International.

Du Plessis LM "Religious Human Rights in South Africa" in JD van der Vyver & J Witte (eds) *Religious Human Rights in Global Perspective* (1996) 441 – 465, The Hague: Kluwer Law International.

Durham WC "Perspectives on Religious Liberty: A Comparative Framework" in JD van der Vyver & J Witte (eds) *Religious Human Rights in Global Perspective* (1996) 1 - 44, The Hague: Kluwer Law International.

Meyerson D "Why Religion Belongs in the Public Sphere, Not the Public Square" in P Cane, C Evans & Z Robinson (eds) *Law and Religion in Theoretical and Historical Context* (2008) 44 - 71, Cambridge: Cambridge University Press.

Ogilvie MH "Between liberté and egalité: Religion and the State in Canada" in P Radan, D Meyerson & R Croucher (eds) *Law and Religion* (2005) 124 - 154, London: Routledge.

Van Schoor MCE "Onderwys in die Oranje-Vrystaat" in J Coetzee (ed) *Onderwys in Suid-Afrika, 1652-1960* (1963) 170 - 185, Pretoria: JL van Schaik.

Van der Vyver JD "Introduction" in JD van der Vyver & J Witte (eds) *Religious Human Rights in Global Perspective* (1996) xi - xlvii, The Hague: Kluwer Law International.

Wanda B "Religion in Public Schools: Some Observations on the South African National Policy on Religion and Education" in CJ Russo, J Beckmann & JD Jansen *Equal Education Opportunities: Comparative Perspectives in Education Law* (2005) 20 - 37, Pretoria: Van Schaik Publishers.

# CASE LAW

## CANADA

*Canadian Civil Liberties Association v Ontario (Minister of Education)* (1990) 71 OR (2d)

*Corporation of the Canadian Civil Liberties Association v Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (CA).

*Loyola High School v Quebec (Attorney General),* 2015 SCC 12.

*R v Big M Drug Mart Ltd* (1985), 1 SCR 295.

*R v Edwards Books & Art Ltd* (1986), 2 SCR 713.

*R v Oakes* (1986), 1 SCR 103.

*Zylberberg v Sudbury (Board of Education)* (1988), 52 DLR (4th) 577.

## EUROPEAN COURT OF HUMAN RIGHTS

*S.A.S v France* 43835/11 (2014) ECHR.

## GERMANY

52 BVerfGE 223 (1979).

## SOUTH AFRICA

*Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC).

*Centre for Child Law v Minister for Justice and Constitutional Development (NICRO as amicus curiae)* 2009 (6) SA 632 (CC).

*Christian Education South Africa v Minister of Education* 1999 (9) BCLR 951 (CC).

*Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC).

*De Reuck v Director of Public Prosecution (WLD)* 2003 (4) SA 160 (T).

*Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC).

*Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC).

*Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* (CCT 209/15)[2016] ZACC 14 (20 May 2016).

*Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

*Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State v Harmony High School and Another* 2014 (2) SA 228 (CC).

*Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC).

*Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).

*Juma Musjid Primary School v Essay No* 2011 (8) BCLR 761 (CC).

*Khosa & Others v Minister of Social Development* 2004 (6) SA 505 (CC).

*MEC for Education: Kwazulu-Natal and Others v Pillay and Others* 2008 (1) SA 474 (CC).

*Member of the Executive Council for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC).

*Minister of Education (Western Cape) v Mikro Primary School Governing Body* (3) All SA 436 (SCA).

*Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

*Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

*President of the Republic of South President of South Africa v Hugo* 1997 (4) SA 1 (CC).

*Prince v President of the Law Society, Cape of Good Hope* 2002 (2) SA 794 (CC).

*Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC).

*Rail Commuters Community Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC).

*S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC).

*S v Makwanyane* 1995 (3) SA 391 (CC).

*S v Manamela & Another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC).

*Western Cape Minister of Education and Others v Governing Body of Mikro Primary School and Another* 2005 (10) BCLR 973 (SCA).

*Wittmann v Deutscher Schülverein, Pretoria* 1998 (4) SA 423 (T).

## UNITED STATES OF AMERICA

*Board of Education of Kiryas Joel Village School District v Gumet* 512 US 687 (1994).

*Clayton v Place*, 884 F.2d. 192 (8th Cir 1989).

*Coles v Cleveland Board of Education* 171 F 3d (6th Cir 1999).

*County of Allegheny v American Civil Liberties Union, Greater Pittsburgh Chapter* 492 US 576 (1989).

*Elk Grove Unified School District v Newdow* 542 US 1 (2004).

*Engel v Vitale* 176 NE 2d 176 (NY 1961).

*Engel v Vitale* 206 NYS 2d 183 (NY App Div 1960).

*Engel v Vitale* 370 US 421 (1962).

*Everson v Board of Education* 330 US 1 (1947).

*Kerr v Farrey*, 95 F 3d 472 (7th Cir 1996).

*Larkin v Grendel's Den, Inc* 459 US 116 (1982).

*Lee v Weisman* 505 US 577 (1992).

*Lemon v Kurtzman* 403 US 602 (1971).

*McCollum v Board of Education*, 333 US 203 (1948).

*Raines v Siegelman*, 2006 WL 691236 (MD Ala).

*Santa Fe Independent School District v Doe* 530 US 290.

*School District of Abington Township v Schempp* 374 US 203 (1963).

*Tilton v Richardson* 403 US 672 (1971).

*Torcaso v Watkins* 367 US 488 (1961).

*Wallace v Jaffree* 472 US 38 (1985).

## CONSTITUTION OF CANADA

Canadian Charter of Rights and Freedoms, 1982.

## CONSTITUTION OF GERMANY

German Basic Law for the Federal Republic of Germany, 1949 (Grundgesetz).

Weimar Constitution (The Constitution of the German Reich).

## CONSTITUTION OF SOUTH AFRICA

Constitution of the Republic of South Africa, 1996.

Constitution of the Republic of South Africa, Act 200 of 1993.

## INTERNATIONAL COMMENTS

Human Rights Committee General Comment No. 22, 5. UN Doc. CCPR/C/21/Rev.1/Add 4 (1993).

## INTERNATIONAL CONVENTIONS

*African Charter on Human and People's Rights* (adopted 27 June 1981, entered into force 21 October 1986 CAB/LEG//67/3.

*African Charter on the Rights and Welfare of the Child* (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49.

*Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religious Belief* (adopted 18 December 1979, entered into force 3 September 1981) A/RES/34/180.

*International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 22 April 1954) 999 UNTS 137.

*United Nations Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

*Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

*Universal Islamic Declaration of Human Rights* (adopted 19 September 1981) 21 Dhul Qaidah 1401.

## INTERNET SOURCES

Ahdar RJ "The nature of religious coercion" (2009) *ExpressO* <http://works.bepress.com/rex_ahdar/1>.

BBC "European Court upholds French full veil ban" (01-07-2014) *BBC* <http://www.bbc.com/news/world-europe-28106900>.

Blumfield B "A Timeline of South African events in Education in the Twentieth Century: 1900-1999" (2008) <http://sahistoryofeducation.webs.com/sa%20timeline.pdf>.

De Vos P "Religion in schools: The finer details of the Constitution" (05-05-2015) *Daily Maverick* <www.dailymaverick.co.za/opinionista/2015-05-05-religion-in-schools-the-finer-details-of-the-constitution/>.

Eshak YI "'Authority' in Christian National Education and Fundamental Pedagogics" (1987) <http://www.sahistory.org.za/archive/authority-christian-national-education-and-fundamental-pedagogics-yousuf-ismail-eshak-1987>.

Henley J "French MPs vote for veil ban in state schools" (11-02-2014) *The Guardian* <https://www.theguardian.com/world/2004/feb/11/schools.schoolsworldwide>.

Hummel U "Bumpy start for Islam classes in Germany" (2016) <http://www.dw.com/en/bumpy-start-for-islam-classes-in-germany/a-16648215>.

Jensen T & Kjeldsen K "Baseline Study: Religious education in Germany" (2014) *Intercultural Education Through Religious Studies* <http://iers.unive.it/files/2014/03/Baseline_Study-RE-in-Germany.pdf>.

Kucukcan DT "Looking at Religions and Religious Education in Secular National Contexts in Western Europe" (2016) Centre for Islamic Studies <http://www.cie.ugent.be/kucukcan2.htm>.

Thamm M "Religion in schools: Watershed case to ensure teaching and not preaching" (03-09-2014) *Daily Maverick* < http://www.dailymaverick.co.za/article/2014-09-03-religion-in-schools-watershed-case-to-ensure-teaching-and-not-preaching/>.

Thelwell E "Does God belong in schools?" (2014-09-05) *News24* <www.news24.com/South Africa/News/Does-God-belong-in-schools-20140905>.

Ward CV "Coercion and choice under the establishment clause" (2006) 39 *Faculty Publications: University of California Paper 10* <http://scholarship.law.wm.edu/facpubs/101>.

## JOURNAL ARTICLES

Barker CR "Church and State Relationships in German 'Public Benefit'" (2000) 3(2) *The International Journal of Not-for-Profit Law* 1-17.

Beckmann J & Prinsloo I "Legislation on school governors' power to appoint educators" friend or foe?" (2009) 29 *South African Journal of Education* 171-184.

Bekink B "The intrinsic uneasy triangle between constitutionalism, secularism and the right to freedom of religion – a South African perspective" (2008) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 481-498.

Berglund J "Publically funded Islamic education in Europe and the United States" *The Brookings Project on US Relations with the Islamic World* (2015) 21 Analysis Paper 16.

Bilchitz D & Williams A "Religion and the public sphere: towards a model that positively recognises diversity" (2012) 28 *South African Journal on Human Rights* 146-175.

Bilchitz D & De Freitas S "Introduction: The right to freedom of religion in South Africa and related challenges" (2012) 28 *South African Journal on Human Rights* 141-145.

Coertzen P "Freedom of religion and religious education in a pluralist society" (2002) 43 *Nederduitse Gereformeerde Teologiese Tydskrif* 185-196.

Coertzen P "Freedom of Religion in South Africa: Then and Now 1652-2008" 29 *Verbum Et Ecclesia JRG* (2008) 345-367.

Coetzee S & Mienie R "The best interest of the child standard in education: an overview of South African case law" (2014) 29 *SAPL* 90-117.

Dickinson GM & Dolmage WR "Education, religion, and the courts in Ontario" (1996) 21 *Canadian Journal of Education* 363-383.

Dickinson GM & Von Vollenhoven W "Religion in public schools: Comparative images of Canada and South Africa" (2002) 20 *Perspectives in Education* 1-20.

Du Plessis LM "Affirmation and celebration of the 'religious Other' in South Africa's constitutional jurisprudence on religious related rights: Memorial constitutionalism in action?" (2008) 8 *African Human Rights Law Journal* 376-408.

Du Plessis LM "Freedom of or freedom from religion? An overview of issues pertinent to the constitutional protection of religious rights and freedom in 'the new South Africa'" (2001) *Brigham Young University Law Review* 439-466.

Du Plessis LM "Religious freedom and equality as celebration of difference: A significant development in recent South African constitutional case law" (2009) 12 *PER/PELJ* 10-34.

Du Plessis LM "Religion, law and state in South Africa" (1997) 4 *European Journal for State and Church Research* 221-238.

Facio A & Morgan MI "Equity or Equality for Women? Understanding CEDAW's Equality Principles" (2009) 60 *Alabama Law Review* 1133-1170.

Farlam P "The ambit of the right to freedom of religion: A comment on *S v Solberg*" (1998) *South African Journal of Human Rights* 298-326.

Freedman W "Understanding the freedom of religion clause in the South African Constitution Bill, 1996" (1996) 1 *The Human Rights and Constitutional Law Journal of Southern Africa* 35-36.

Gomez E "Equity, Gender and Health: Myths and Realities" (2004) *Women's Health Journal* 54-61.

Gruchy JW "The Relationship between the State and some Churches in South Africa, 1968-1975" (1977) 19 *Journal of Church and State* 437-455.

Heystek J "School governing bodies in South African schools: Under pressure to enhance democratisation and improve quality" (2011) 39 *Educational Management Administration & Leadership* 455-468.

Karlsson J "The role of democratic governing bodies in South African schools" (2002) 38 *Comparative Education* 327-336.

Labuschagne BC "Religious freedom and newly-established religions in Dutch law" (1997) 44(2) *Nederlands International Law Review* 168-185.

Lenaghan PM "Restoring the 'Historical Deficit': The Exercise of the Right to Freedom of Religion and Culture in Democratic South Africa" (2013) 29 *South African Journal of Human Rights* 294-313.

Lewis A & Steyn JC "A critique of mission education in South Africa according to Bosch's mission paradigm theory" (2003) 23 *South African Journal of Education* 101-106.

Liebenberg S "Deepening democratic transformation in South Africa through participatory constitutional remedies" (2014) *National Journal of Constitutional Law* 1-40.

Liebenberg S "Engaging the paradoxes of the universal and particular in human rights adjudication: the possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *African Human Rights Law Journal* 1-29.

Lotter HPP "Religion and Politics in a Transforming South Africa" (1992) 34 *Journal of Church and State* 475-502.

Malherbe EFJ "Die grondwetlike beskerming van godsdiensvryheid" (2008) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 673-701.

Malherbe R "Enkele kwelvrae oor die grondwetlike beskerming van die reg op godsdiensvryheid" (2006) 4 *Tydskrif van die Suid-Afrikaanse Reg* 629-649.

Malherbe R "Religion in school" (2013) 4 *NGTT* 1-10.

Malherbe R "The constitutional dimension of the best interest of the child as applied in education" (2008) 2 *Tydskrif van die Suid-Afrikaanse Reg* 267-285.

Malherbe R "The right to freedom of religion in South African schools: Recent disturbing events" (2004) 1 *International Journal for Educational Law and Policy* 248-257.

Mayer AE "Law and Religion in the Muslim Middle East" (1987) 35 *The American Journal of Comparative Law* 127-184.

Meuhlhoff I "Freedom of religion in public schools in Germany and the United States" (2000) 28 *Georgia Journal of International and Comparative Law* 405-492.

Msila V "From apartheid education to the revised national curriculum statement: Pedagogy for identity formation and nation building in South Africa" (2007) 16 *Nordic Journal of African Studies* 146-160.

Mureinik E "A bridge to where? Introduction to the interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31-47.

Peterson MA "The Supreme Court's coercion test: insufficient constitutional protection for America's religious minorities: (2001) 11 *Cornell Journal of Law and Public Policy* 245-272.

Pieterse M "Many sides to the coin: the constitutional protection of religious rights" (2001) *XXXIII CILSA* 300-317.

Pillay GJ "Church, State and Christian Pluralism in South Africa: A historical overview" (1995) 21 *Studia Historiae Ecclesiasticae* 1-86.

Serfontein EM & De Waal E "The effectiveness of legal remedies in education: A school governing body perspective" (2013) *De Jure* 45-62.

Smith J "South Africa's Developing Model of Religion-State Relations" (2005) *Occasional Paper 18* 1-18.

Smith N "Freedom of religion under the final constitution" (1997) 114 *South African Law Journal* 217-225.

Strasser M "The coercion test: on prayer, offence, and doctrinal inculcation" (2009) 53 *Saint Louis University Law Journal* 417-485.

Van der Schyff G "Cannabis, religious observance and the South African Bill of Rights" (2003) 1 *Tydskrif van die Suid-Afrikaanse Reg* 122-140.

Van der Schyff G "Freedom of religious autonomy as an element of the right to freedom of religion" (2003) 3 *Tydskrif van die Suid-Afrikaanse Reg* 512-539.

Van der Vyver J "Constitutional Perspectives of Church-State Relations in South Africa" (2001) 8 *Brigham Young University Law Review* 635-673.

Van der Walt JL "Religion in education in South Africa: was social justice served?" (2011) 31 *South African Journal of Education* 381-393.

Van der Walt JL "Religion in education: is there yet another solution?" 75 *Koers* 79-98.

Waltman J "Communities in conflict: the school prayer in West Germany, the United States and Canada" (1991) 27 *Canadian Journal of Law and Society* 26-43.

Woolman S & Fleisch B "Democracy, social capital and school governing bodies in South Africa" (2008) 20 *Education and the Law* 47-80.

## LEGISLATION

Bantu Education Act 47 of 1953.

Black (Urban Areas) Consolidation Act 25 of 1945.

Coloured People's Education Act 47 of 1963.

Gauteng School Education Act 6 of 1995.

Immorality Act 23 of 1957.

Indian Education Act 61 of 1965.

Internal Securities Act 74 of 1982.

Liquor Act 27 of 1989.

National Education Policy Act 39 of 1967.

Private Schools Act (House of Assembly) 104 of 1986.

Prohibition of Mixed Marriages Act 55 of 1949.

South African Schools Act 84 of 1996.

## LOOSE LEAF PUBLICATIONS

Albertyn C "Equality" in Cheadle MH, Davis DM & Haysom HRL (eds) *South African Constitutional Law: The Bill of Rights* (2005), Durban: LexisNexis South Africa.

Albertyn C & Goldblatt B "Equality" in Woolman S, Roux, T & Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (2009), Claremont: Juta.

Farlam P "Freedom of Religion, Belief and Opinion" in Woolman S, Roux T & Bishop M (reds) *Constitutional Law of South Africa* 2nd ed (2009), Claremont: Juta.

Smith N "Freedom of Religion" in Woolman S, Roux T & Bishop M (reds) *Constitutional Law of South Africa: Revision Service 2* (1998), Claremont: Juta.

Woolman S & Botha H "Limitations" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (2009), Claremont: Juta.

## NEWSPAPER ARTICLES

Mureinik E "Let's Privatise God" *Mail and Guardian* (01-11-1995) 13.

## POLICY DOCUMENTS

Ministry of Education *National Policy on Religion and Education* (2003) <www.info.gov.za/view/DownloadFileAction?id=70211>.

## REPORTS

Union of South Africa *Report of the Native Education Commission 1949-1951* (1951) UG53-1951.

## UNPUBLISHED THESES

Janse van Vuuren AE *Religious Education in Secondary Schools* (1996) Master thesis, Johannesburg: Rand Afrikaanse University.

Jarvis J *The voice of the teacher in the context of religious freedom: a Kwazulu-Natal case study* (2008) unpublished Master-thesis, Stellenbosch: University of Stellenbosch.

Lewis A *Past and present perceptions surrounding mission education: A historical metabletical overview* (1999) unpublished D.Ed thesis, Stellenbosch: University of Stellenbosch.

Rakometsi MS *The transformation of black school education in South Africa, 1950-1994: A historical perspective* (2008) unpublished DPhil-thesis Bloemfontein: University of the Free State.

Van der Schyff G *The right to freedom of religion in South Africa* (2001) unpublished LLM thesis Johannesburg: Rand Afrikaanse Universiteit.

Watt NR *A critical examination of 'meaningful engagement' with regard to education law* (2014) unpublished LLM dissertation, Pretoria: University of Pretoria.